

No. 82-1330

Office - Supreme Court, U.S.

FILED

SEP 8 1983

ALEXANDER L. STEVENS

CLERK

In the Supreme Court of the United States

October Term, 1982

MORRIS L. THIGPEN, COMMISSIONER, ET AL.,
Petitioners,

vs.

BARRY JOE ROBERTS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

BILL ALLAIN, Attorney General
State of Mississippi
WILLIAM S. BOYD, III
(*Counsel of Record*)
Special Assistant Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680
Attorneys for Petitioners

CLEVE McDOWELL
Attorney at Law
Post Office Box 1205
Cleveland, Mississippi 38732
Attorney for Respondent

Petition for Certiorari Filed February 9, 1983
Certiorari Granted May 31, 1983

INDEX TO APPENDIX

Docket Entries	1-3
Petition for Writ of Habeas Corpus with Exhibits	4-85
Order	86
Answer and Return to Petition for Writ of Habeas Corpus	87-89
Record Excerpts filed Pursuant to 28 U.S.C. § 2254 Rule 5	90-101
Order	102
Supplement to Rule 5 Exhibits	103-111
Petitioners [sic] Response to Respondents [sic] Rule 5 Exhibits	112
Order	113
Order	114
Report and Recommendation	115
Respondent's Objection to Magistrate's Report and Rec- ommendation	116-132
Order	133
Notice of Appeal	134
Opinion of the United States Court of Appeals for the Fifth Circuit	135

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI**

Number DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

vs.

**MORRIS THIGPEN, COMMISSIONER MISSISSIPPI
DEPARTMENT OF CORRECTIONS EDDIE LUCAS,
WARDEN; MISSISSIPPI DEPARTMENT OF
CORRECTIONS,**
Respondents.

DOCKET ENTRIES

Date	NR.	Proceedings
3-16-81	1	PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY.
3/23/81	83	Mag's Order allowing respondent 20 days w/in which to file answer to the petition in accordance with Rule 5, Governing §2254 Cases. It is further ordered that the clerk of ct shall serve by certified mail to the Atty. Gen a copy of the petition and order. Mailed copy of order and petition to State Atty Gen. at his usual mailing address.
4/23/81	84	ANSWER and return to petition for Writ of Habeas Corpus. (With attachments)

- 6/29/81 87 Mag's Order requiring respondent to file with the court all records relating to the misdemeanor convictions appeal of which was consolidated with petitioner's manslaughter trial, etc. w/in 14 days.
- 7/10/81 88 Supplement to Rule 5 Exhibits, from respondents.
- 7-16-81 94 Petitioner's Response to Respondents' Rule 5 Exhibit.
- 8/17/81 96 Mag's order requiring petitioner to supplement his petition to specify what evidence he contends was properly admitted on the misdemeanor appeals in question that was not otherwise admissible on the manslaughter charge against petitioner.
- 8/31/81 97 SUPPLEMENTAL Petition of Barry Joe Roberts.
- 10/ 1/81 100 Mag's Order directing respondent to file w/in 14 days a memo setting forth the reasons why petitioner should not be granted h.c. relief. etc.
- 10/13/81 101 MOTION for add'l time in which to file Memo. to show cause why petitioner should not be granted Habeas Relief.
- 10/15/81 104 Mag's Order extending time w/in which to file their responsive brief to Oct. 21, 1981.
- 11-4-81 105 MAG'S REPORT & RECOMMENDATION.
- 11/23/81 108 Court's Order (LTS) that the R&R of the U. S. Mag is adopted as the opinion of the

court; and that the petition for a writ of habeas corpus is granted, that petitioner's May 15, 1978 manslaughter conviction is VACATED, and that respondent shall forthwith release petitioner from custody. COB 23, Page 104 Notice of entry mailed to counsel. JS-6

- 11/25/81 109 COURT'S ORDER: ORDERED that the court's order of November 19, 1981 is hereby stayed pending the court's review of defts' objections, if any, which must be filed within fifteen days of this Order. COB 23, Page 105. Notice of entry mailed to counsel.
- 12/ 9/81 110 Respondent's Objection to Magistrate's R&R.
- 1/21/82 125 Court's Order (LTS,Jr.): That the stay ordered on November 23, 1981 is hereby lifted. COB 23, Page 144 Notice of entry mailed to counsel.
- 2/18/82 127 NOTICE OF APPEAL. Copy to 5th Circuit with certified copy of docket entries, and copy to counsel. Filing fee unpaid.
- 2/22/82 Filing Fee Paid R#7149 \$70.00.
- 2/24/82 Original Record mailed to 5th Circuit by Certified Mail. No transcript necessary. Certified copy of docket entries mailed to counsel of record along with copy of transmittal letter.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI

NUMBER DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

vs.

MORRIS THIGPEN, COMMISSIONER MISSISSIPPI DE-
PARTMENT OF CORRECTIONS EDDIE LUCAS, WAR-
DEN; MISSISSIPPI DEPARTMENT OF CORRECTIONS,
Respondents.

**PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY**

ORAL ARGUMENT REQUESTED

EVIDENTIARY HEARING REQUESTED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI

No.

(To be filled
in by clerk)

BARRY JOE ROBERTS, PETITIONER

(Full name and prison number, if any) (Include name
under which you were convicted, if different.)

v.

MORRIS THIGPEN, COMMISSIONER MISSISSIPPI DE
PARTMENT OF CORRECTIONS EDDIE LUCAS, WAR-
DEN; MISSISSIPPI DEPARTMENT OF CORRECTIONS,
RESPONDENT

(Name of Warden, Superintendent, Jailor or other person
having custody of petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF
MISSISSIPPI, ADDITIONAL RESPONDENT

(If petitioner is attacking a judgment which imposed a
sentence to be served in the *future*, petitioner must fill in
the name of the state where the judgment was entered. If
petitioner has a sentence to be served in the *future* under
a federal judgment which he wishes to attack, he should
file a motion under 28 U.S.C. §2255, in the federal court
which entered the judgment.)

Instructions—Read Carefully

- (1) This petition must be legibly handwritten or type-
written, signed by the petitioner and sworn to before

a notary public or institutional officer authorized to administer an oath. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

- (2) Additional pages should not be attached except as indicated in the body of this form. The petition may not include any arguments or citations of authorities. A separate brief or memorandum of authorities may be filed if desired.
- (3) Upon receipt of a filing fee of \$5.00 your petition will be filed if it is in proper order.
- (4) If you do not have the necessary filing fee, you may request permission to proceed *in forma pauperis*, in which event you must execute the affidavit on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor.
- (5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts, you must file separate petitions as to each court.
- (6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction. You will be deemed to have waived all grounds not included.
- (7) When the petition is completed, the original and two copies must be mailed to the Clerk of the United States District Court, whose address is P. O. Box 727, Oxford, Mississippi 38655.
- (8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY

1. Place of Confinement Mississippi Department of Corrections
2. Name and location of court which entered the judgment of conviction under attack First Judicial District of Tallahatchie County; Charleston, Mississippi
3. Date of judgment of conviction May 15, 1978
4. Length of sentence Twenty years
5. Nature of offense involved (all counts): Manslaughter
6. What was your plea? (Check one)
 - (a) Not guilty ☒
 - (b) Guilty ☐
 - (c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: N/A

7. Kind of trial: (Check one) Jury ☒ Judge only ☐
8. Did you testify at the trial? Yes ☒ No ☐
9. Did you appeal from the judgment of conviction?
Yes ☒ No ☐
10. If you did appeal, answer the following:
 - (a) Court appealed to Mississippi Supreme Court
 - (b) Result Conviction affirmed
 - (c) Date of result 12-5-79 See Exhibit "1"
11. If you did not appeal, please explain briefly why you did not. N/A

12. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes [X]
No []
13. If your answer to 12 was "yes," give the following information:
- (a) (1) Name of court Mississippi Supreme Court
 - (2) Nature of proceedings Writ of Error
Coram Nobis or in the Alternative Habeas Corpus
 - (3) Grounds raised:
 - A. Double Jeopardy
 - B. Court certified defective special venire.
 - C. Court allowed improper consolidations.
 - D. Lack of proper legal representation.
 - (4) Did you receive an evidentiary hearing on your petition, application or motion:
Yes [] No [X]
 - (5) Result N/A
 - (6) Date of Result N/A
 - (7) If the result was against you, did you appeal? Yes [] No [X]
 - (8) If you did appeal, state the name of the court appealed to and the result of the appeal N/A
 - (9) If you did not appeal explain briefly why you did not appeal: Mississippi Supreme Court is highest State Court.

- (b) If you have filed more than one such petition, application or motion, give the same information as in (a) above for each such additional petition, application or motion. This information may be set out on a separate sheet attached to this petition and clearly labeled as a part of your answer to 13. N/A
14. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same. Such additional pages must be clearly labeled as a part of your answer to 14.

CAUTION In order to proceed in the federal court, you must first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date. You should carefully read again the instructions on page 1 before you complete the rest of this form.

GROUND 1. See Exhibit "2"

Supporting FACTS (tell your story *briefly* without citing cases of law):

The Trial Court erred in permitting the Petitioner to be indicted and tried upon a set of facts and circumstances which formed the basis for previous Justice Court charges for which the Petitioner had been tried, convicted, and sentenced.

Petitioner was tried and convicted of several misdemeanor charges which constituted a legal and factual bar to the further prosecution of the Petitioner.

Explain briefly the steps you have taken to present this ground to the state courts: Contained in the Writ application before Mississippi Supreme Court.

GROUND 2. See Exhibit "2"

Supporting FACTS (tell your story briefly without citing cases or law):

The Trial Court erred in vacating its order denying Appellant a special venire and in later during the trial declaring that a special venire had in fact been given and Petitioner's Trial Attorney was negligent in not objecting to same.

The Court certified a defective special venire. Explain briefly the steps you have taken to present this ground to the state courts: Contained in the Writ application before the Mississippi Supreme Court.

GROUND 3. See Exhibit "2"

Supporting FACTS (tell your story briefly without citing cases or law):

The Trial Court erred in permitting the State to consolidate the misdemeanor Appeals (Tallahatchie Circuit Court Numbers 4266, 4267, 4268 and 4269) and to receive evidence relating to same during Trial of the related Felony count (No. 4265) and Appellant's Trial Attorney was grossly negligent in not objecting to same.

Petitioner had several Justice Court sentences appealed along with his Trial for Manslaughter.

Explain briefly the steps you have taken to present this ground to the state courts: Contained in Petition before Mississippi Supreme Court.

GROUND 4. See Exhibit "2"

Supporting **FACTS** (tell your story *briefly* without citing cases or law):

The legal representation of the Petitioner at the Trial level and at the initial Appellate submission was grossly incompetent and prejudicially negligent and entitles the Petitioner to a new trial.

The Petitioner was not properly represented by counsel at the trial level. See Exhibit "3"

Explain briefly the steps you have taken to present this ground to the state courts: Contained in the Petition before the Mississippi Supreme Court.

15. If any of the grounds listed in 14 have not been presented in the state courts give your reasons for not presenting each such ground in the state courts: N/A
16. Do you have any petition or appeal now pending in any courts, either state or federal, as to the judgment under attack? Yes [] No [X]
17. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
 - (a) At preliminary hearing Hon. J.W. Kellum, Sumner, Mississippi
 - (b) At arraignment and plea Hon. J. W. Kellum, Sumner, Mississippi
 - (c) At trial Hon. J. W. Kellum, Sumner, Mississippi

- (d) At sentencing Hon. J. W. Kellum, Sumner, Mississippi
 - (e) On appeal Hon. J. W. Kellum, Sumner, Mississippi
 - (f) In any post-conviction proceeding Hon. Cleve McDowell, Post Office Box 1205; Cleveland, MS 38732
 - (g) On appeal from any adverse ruling in a post-conviction proceeding N/A
 - (h) At any parole or probation revocation proceedings N/A
18. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court at the same time? Yes [] No [X]
19. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes [] No [X]
- (a) If so, give name and location of court which imposed the sentence to be served in the future: N/A
 - (b) And give date and length of sentence to be served in the future N/A
 - (c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes [] No [] N/A
20. What relief do you ask the Court to grant you?

Order the conviction set aside and Order a new trial.

Executed at Parchman, Mississippi on March 13, 1981.

/s/ Barry Joe Roberts
Signature of Petitioner

Subscribed and sworn to before me, this the 13th day
of March, 1981.

/s/ Mary Sandefer

Notary Public or other per-
son authorized to adminis-
ter an oath

My Commission Expires: Aug. 22, 1984.

/s/ Cleve McDowell

Signature of attorney, if any

FORMA PAUPERIS AFFIDAVIT

(See instructions at beginning of this form)

I hereby apply for leave to proceed with this petition
for writ of habeas corpus without prepayment of fees or
costs or giving security therefor. In support of my ap-
plication, I state under oath that the following facts are
true:

- (1) I am the petitioner in said petition, and I believe
that I am entitled to redress.
- (2) I am unable to prepay the costs of said action, or
give security therefor.
- (3) I have no assets or funds which could be used
to prepay the fees or costs except

.....
(Write "None" above if you have nothing; other-
wise, list your assets.

.....
Signature of Petitioner.

(Sign here *only* if you seek to
proceed without prepayment of
fees and costs.)

Subscribed and sworn to before me this day of
....., 19.....

.....
Notary Public or other person
authorized to administer an
oath.

My Commission Expires:

EXHIBIT "1"

IN THE SUPREME COURT OF MISSISSIPPI

NO. 51,552

BARRY JOE ROBERTS,

v.

STATE OF MISSISSIPPI.

BEFORE ROBERTSON, LEE and BOWLING

LEE, JUSTICE, FOR THE COURT:

Barry Joe Roberts was convicted in the Circuit Court of Tallahatchie County of manslaughter by culpable negligence and was sentenced to twenty (20) years in the Mississippi State Penitentiary. He appeals and assigns two (2) errors in the trial below.

I.

Did the trial court err in overruling appellant's motion for a peremptory instruction of not guilty?

In passing on this question, the Court considers all evidence favorable to the State, together with reasonable

inferences flowing therefrom, and, if such evidence is sufficient to present a guilt question for the jury, the peremptory instruction should be refused. *Warn v. State*, 349 So. 2d 1055 (Miss. 1977).

On August 6, 1977, at approximately 7:00 p.m., Mrs. Mary Ella Bonner was driving her pickup truck in a southerly direction on Mississippi State Highway 35 between Charleston and Batesville. Two (2) other persons were riding in the cab of the truck with her, and five (5) children were riding in the bed of the truck. Appellant was driving an automobile in a northerly direction on said highway and, as the two vehicles approached each other, appellant's automobile ran off the east side of the highway, came back upon it and collided with the Bonner truck in the southbound lane of travel. Brenda Gail Bonner, ten-year-old daughter of Mrs. Mary Ella Bonner, sustained a broken neck in the collision and expired at the scene.

Mrs. Louise Goad, who operated a store which dispensed alcoholic beverages, testified that, at approximately 5:30 p.m. on the date of the accident, appellant purchased beer for himself and a companion and also a six-pack of beer to carry with them. She observed that appellant had been drinking excessively at that time.

Mr. E. J. Dungan, a former law enforcement officer, saw appellant at approximately 6:45 p.m. on said day, driving north on Highway 35 at a high rate of speed, which he estimated at ninety (90) miles per hour. He went to the scene of the accident, observed the position of the cars and debris, and that appellant's eyes were red. However, he did not testify that appellant was intoxicated.

Reverend W. T. Barkley and Margaret Barkley, his wife, were proceeding south on Highway 35 directly behind

Mrs. Bonner's truck before, and at the time of, the collision. He said that appellant's car ran off the highway, turned sideways, came back upon it, turned sideways again, and collided with the Bonner truck in the southbound lane. He walked over to appellant's car and "It smelled like it was a beer truck wreck rather than a car." Mrs. Barkley corroborated her husband as to the details of the collision.

Mrs. Mary Ella Bonner testified that, as she was driving her truck south upon the highway, she saw appellant's car approaching at an extremely high rate of speed, the car left the highway, swerved back upon it, went into a spin, and collided with her truck in the southbound lane of travel.

Thomas McLeod, Mississippi State Highway patrolman, went to the scene for the purpose of investigating the collision. He detected the odor of alcohol on appellant, who was unstable in his walking, was glassy-eyed and appeared to be under the influence of alcohol. Officer McLeod asked him what he was drinking, and appellant replied, "Well, I have been drinking beer all afternoon." McLeod was of the opinion that appellant's ability to operate a motor vehicle was impaired as a result of intoxication.

Appellant testified that he leaned over to pick up a tape for his tape player, which had fallen to the floorboard, and, in doing so, lost control of the vehicle, which resulted in the collision.

Culpable negligence, as defined by the Court, is negligence that is so gross and wanton as to evidence an utter disregard for the safety of human life. *Smith v. State*, 197 Miss. 802, 20 So. 2d 701 (1945).

The fact that a person is intoxicated may be shown as a contributing factor to the collision. In the present

case, it was the jury's prerogative to determine whether or not appellant's condition from drinking alcoholic beverages contributed to the tragedy, particularly since the highway patrolman testified that, in his opinion, appellant's driving ability was impaired by alcohol. Under the facts of this case, there was a question for the jury as to whether or not appellant's conduct was so gross and wanton as to come within the culpable negligence rule stated above.

II.

Did the trial court err in granting the State's Instructions S-1 and S-2?

The instructions offensive to the appellant follow:

"S-1

The Defendant, BARRY JOE ROBERTS, has been charged by an Indictment with the crime of Manslaughter for having by his culpable negligence caused the death of BRENDA BONNER.

If you find from the evidence in this case beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis consistent with innocence that

(a) The deceased, BRENDA BONNER, was a living person; and

(b) That she died as a result of the Defendant's gross negligence demonstrating a reckless disregard for the safety of human life in operating a motor vehicle in a reckless manner, while under the influence of an intoxicant or alcoholic beverages, on the wrong side of Highway No. 35N, while his operator's license had been revoked or suspended by the Department of Public Safety, and in hitting and striking a vehicle in which the Deceased was a passenger with the vehicle

operated by the Defendant, then you shall find the Defendant guilty of Manslaughter.

If the State has failed to prove any one or more of these elements beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis consistent with innocence, then you shall find the Defendant not guilty."

"S-2

Culpable negligence is, as used in these instructions, conduct which exhibits or manifests a wanton or reckless disregard for the safety of human life, or such indifference to the consequences of the Defendant's act under the surrounding circumstances as to render his conduct tantamount to wilfulness."

Appellant relies upon *Cutshall v. State*, 191 Miss. 764, 4 So. 2d 289 (1941), as authority that the instructions constitute error. An instruction on intoxication was given in *Cutshall* and condemned as error. The instruction stated:

"The Court charges the jury for the State that it is a violation of the criminal laws of the State of Mississippi for a person to operate a motor vehicle on a public highway while under the influence of intoxicating liquor; and if you believe from the evidence in this case beyond a reasonable doubt that the defendant, Floyd Cutshall, unlawfully operated the pickup truck on public highway number 72 at a time when he was under the influence of intoxicating liquor, and in a manner constituting culpable negligence as defined in State instruction number 2, and that as a proximate result thereof Spangler Gregson was killed, then it is your sworn duty to find the defendant guilty as charged.'" 191 Miss. at 770, 4 So. 2d at 291.

The error in the above instruction resulted from the fact that the court told the jury it could return a guilty verdict of manslaughter by culpable negligence if Cutshall was guilty of driving while under the influence of intoxicating liquors. As stated in *Cutshall*, a person may violate a traffic law and still not be culpably negligent and guilty of manslaughter, and, on the other hand, even though one does not violate the law yet he may be culpably negligent and guilty of the crime.

The Instruction S-1 differs from that condemned in *Cutshall*. Instruction S-1 (which placed a higher burden upon the State by requiring it to prove appellant's guilt to the exclusion of every other reasonable hypothesis) submitted to the jury the question of whether or not appellant was guilty of gross negligence demonstrating a reckless disregard for the safety of human life in operating a motor vehicle in a reckless manner while under the influence of alcoholic beverages. The Instruction S-2 defined "culpable negligence" and was a proper statement of the law. *Cutchens v. State*, 310 So. 2d 273 (Miss. 1975). Also, the appellant requested and was granted an instruction which was similar to S-2 in defining culpable negligence, and was similar to S-1(b) in the definition of culpable negligence.

We are of the opinion that no error resulted in the granting of said instructions and that the judgment of the lower court should be affirmed.

AFFIRMED.

**PATTERSON, C.J., SMITH, P.J., ROBERTSON, P.J.,
SUGG, WALKER, BROOM, BOWLING and COFER, JJ.,
CONCUR.**

EXHIBIT "2"

IN THE SUPREME COURT OF THE STATE
OF MISSISSIPPI

MISC. NO.

BARRY JOE ROBERTS,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

**MOTION FOR LEAVE TO FILE APPLICATION FOR
WRIT OF ERROR CORAM NOBIS OR IN THE AL-
TERNATIVE FOR WRIT OF HABEAUS CORPUS**

COMES NOW, the Petitioner, BARRY JOE ROBERTS, by and through Attorney, Cleve McDowell, and respectfully moves this Court pursuant to the provisions of Section 99-35-145 of the Mississippi Code of 1972, as Amended, and Rule 38 of the Rules of the Supreme Court of Mississippi, to grant this his petition for leave to file an application for a writ of error coram nobis in the Circuit Court of Tallahatchie County, Mississippi, or in the alternative, entertain a Writ of Habeaus Corpus in Petitioner's behalf; in support of which, of Petitioner would show the following:

I.

"THE TRIAL COURT ERRED IN PERMITTING THE PETITIONER TO BE INDICTED AND TRIED UPON A SET OF FACTS AND CIRCUMSTANCES WHICH FORMED THE BASIS FOR PREVIOUS JUSTICE COURT CHARGES FOR WHICH THE PETITIONER HAD BEEN TRIED, CONVICTED, AND SENTENCED."

II.

"THE TRIAL COURT ERRED IN VACATING ITS ORDER DENYING APPELLANT A SPECIAL VENIRE AND IN LATER DURING THE TRIAL DECLARING THAT A SPECIAL VENIRE HAD IN FACT BEEN GIVEN AND PETITIONER'S TRIAL ATTORNEY WAS NEGLIGENT IN NOT OBJECTING TO SAME."

III.

"THE TRIAL COURT ERRED IN PERMITTING THE STATE TO CONSOLIDATE THE MISDEMEANOR APPEALS (TALLAHATCHIE CIRCUIT COURT NUMBERS 4266, 4267, 4268, and 4269) AND TO RECEIVE EVIDENCE RELATING TO SAME DURING TRIAL OF THE RELATED FELONY COUNT (NO. 4265) AND APPELLANT'S TRIAL ATTORNEY WAS GROSSLY NEGLIGENT IN NOT OBJECTING TO SAME."

IV.

"THE LEGAL REPRESENTATION OF THE PETITIONER AT THE TRIAL LEVEL AND AT THE INITIAL APPELLATE SUBMISSION WAS GROSSLY INCOMPETENT AND PREJUDICIALLY NEGLIGENT AND ENTITLES THE PETITIONER TO A NEW TRIAL."

V.

Accordingly, the Petitioner contends and would show that he is at present illegally confined in violation of the criminal laws of the State of Mississippi and of the United States of America; in violation of his rights under the Constitutions of the United States and the State of Mississippi as well as the laws thereunder applicable; specifically, the course of conduct pursued by the State of Mis-

Mississippi is violative of the following rights owing Petitioner:

1. The right to the due process of law under the Fourteenth Amendment of the Constitution of the United States of America;

2. The right to the equal protection of the laws as embodied in the Fourteenth Amendment of the United States Constitution;

3. The correlative right to the due process of law contained in Article 3, Section 14 of the Mississippi Constitution (1890);

4. The right to the due course of law as granted by Article 3, Section 24 of the Mississippi Constitution (1890).

WHEREFORE, premises considered, the Petitioner respectfully requests that leave to file an application for a Writ of Error Coram Nobis be granted the Petitioner or in the alternative entertain a Writ of Habeas Corpus in Petitioner's behalf.

EXHIBIT "2a"

IN THE
CIRCUIT COURT OF TALLAHATCHIE COUNTY,
MISSISSIPPI

NUMBER 51,552

BARRY JOE ROBERTS,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

**PETITION FOR WRIT OF ERROR CORAM NOBIS
OR IN THE ALTERNATIVE FOR WRIT OF
HABEAUS CORPUS**

ORAL ARGUMENT REQUESTED

COMES NOW, the Petitioner, BARRY JOE ROBERTS, by and through his Attorney, Cleve McDowell, and respectfully moves this court pursuant to the provisions of Section 99-35-145 of the Mississippi Code of 1972, as amended, to grant this his petition for a writ of error coram nobis or in the alternative, entertain a writ of habeaus corpus Petitioner's behalf; in support of which, the Petitioner would show the following:

I.

In the afternoon of August 6, 1977, at approximately 6:00 p.m., the Petitioner, BARRY JOE ROBERTS, was the driver of a vehicle on Mississippi Highway 35 between Charleston and Batesville. The Petitioner had one pas-

senger with him. While attempting to recover a fallen tape, appellant lost control of his vehicle and was involved in a collision wherein a ten year old child riding on the back of a truck was fatally injured. Barry Joe Roberts, under Section 97-3-47, Mississippi Code, 1972 Annotated, was indicted, tried and convicted in the Circuit Court of the First Judicial District of Tallahatchie County at the May, 1978, Term, for manslaughter, because of the death of the child in the truck collision, which allegedly was the result of culpable negligence on the part of the Petitioner. He was sentenced to serve twenty years in the custody of the Mississippi Department of Corrections. The Mississippi Supreme Court has affirmed said conviction. The facts contained in this paragraph are within the personal knowledge of Petitioner, BARRY JOE ROBERTS and are contained in the Trial transcript of said cause now on file with the Mississippi Supreme Court.

II.

"THE TRIAL COURT ERRED IN PERMITTING THE PETITIONER TO BE INDICTED AND TRIED UPON A SET OF FACTS AND CIRCUMSTANCES WHICH FORMED THE BASIS FOR PREVIOUS JUSTICE COURT CHARGES FOR WHICH THE PETITIONER HAD BEEN TRIED, CONVICTED, AND SENTENCED."

On August 13, 1977, Petitioner was tried in Beat one of the Justice Court System of Tallahatchie County, Mississippi, on the specific misdemeanor charges of wreckless driving, driving while license revoked or suspended, driving under the influence. Said charges constituted causes numbers 4266, 4267, 4268 and 4269, respectively, in the Circuit Court of the First Judicial District of Tallahatchie County, Mississippi, when they were appealed therein. Appellant was convicted in said Justice Court

and received the following sentences: pay a fine of One Hundred Dollars (\$100.00); pay a fine of One Hundred Dollars (\$100.00) and six (6) months in the County Jail; pay a fine of One Thousand (\$1000.00) and eleven (11) months in the County Jail, respectively. The facts and circumstances upon which the charges were tried in said Justice Court and the facts and circumstances which formed the basis of the subject indictment are the same. The convictions of the Petitioner on the charges in causes numbers 4266, 4267, 4268, and 4269 in said Justice Court constituted a legal and factual bar to the prosecution of the Petitioner on the indictment herein. The prosecution of the Petitioner on the Fifth Amendment to the United States Constitution and Article 3, Section 22, of the Constitution of the State of Mississippi. The facts contained in this paragraph are within the personal knowledge of Petitioner, BARRY JOE ROBERTS.

III.

"THE TRIAL COURT ERRED IN VACATING ITS ORDER DENYING APPELLANT A SPECIAL VENIRE AND IN LATER DURING THE TRIAL DECLARING THAT A SPECIAL VENIRE HAD IN FACT BEEN GIVEN AND PETITIONER'S TRIAL ATTORNEY WAS NEGLIGENT IN NOT OBJECTING TO SAME."

The Petitioner requested in a pretrial motion that a special venire be granted and that request was denied by the Trial Judge that they were running short of jurors and the Trial Judge said that he either pulled some names out of a box or told the clerk to do so. The trial Judge later in the trial ruled that a Special Venire had in fact been granted. It is urged that the trial court erred in this determination in as much as the requirements for a

special venire are set forth in the statutes and further require that the Petitioner and his attorney be present at the drawing of such. In this instance, neither the Petitioner or his attorney were present. It is further urged that Petitioner was prejudiced by same. The facts contained in this paragraph are within the personal knowledge of Petitioner, BARRY JOE ROBERTS and are contained in the trial transcript of said cause now on file with the Mississippi Supreme Court.

IV.

"THE TRIAL COURT ERRED IN PERMITTING THE STATE OF CONSOLIDATE THE MISDEMEANOR APPEALS (TALLAHATCHIE CIRCUIT COURT NUMBERS 4266, 4267, 4268 and 4269) AND TO RECEIVE EVIDENCE RELATING TO SAME DURING TRIAL OF THE RELATED FELONY COUNT (NO. 4265) AND APPELLANT'S TRIAL ATTORNEY WAS GROSSLY NEGLIGENT IN NOT OBJECTING TO SAME."

Prior to the beginning of the felony indictment in the Circuit Court, the Petitioner had been convicted in the justice court on four separate lesser offenses which were appealed to the circuit court of Tallahatchie County. The Trial Court consolidated the cases on appeal from the justice court and tried the felony indictment along with the appeals. It is urged that the above actions by the Trial Court, the State and the trial defense attorney were in error. The facts cited in this paragraph are within the personal knowledge of the Petitioner, BARRY JOE ROBERTS, and are contained in the Trial transcript now on file with the Mississippi Supreme Court.

V.

"THE LEGAL REPRESENTATION OF THE PETITIONER AT THE TRIAL LEVEL AND AT THE INITIAL APPELLATE SUBMISSION WAS GROSSLY INCOMPETENT AND PREJUDICIALLY NEGLIGENT AND ENTITLES THE PETITIONER TO A NEW TRIAL."

It is urged that the naturally inflammatory nature of the death of a young child in a sparsely populated rural county where many residents are either relatives or friends of each other, it was basic and necessary for the proper defense of the Petitioner that a change of venue be sought in Petitioner's behalf. Indeed, in the instant case, relatives of the deceased child served on the grand jury which indicted the Petitioner according to the grand jury records. These facts are supported by affidavits and a certified copy the Grand Jury list in question from the Circuit Clerk of Tallahatchie County, Mississippi, which are attached as "Exhibits 1", 2", and "3". Facts are not before this court which show that such request would have been granted, however, the failure of the Petitioner's trial attorney to request such a change, when seen with other matters relating to this case, is clearly indicative of the fact that the Petitioner was never given the opportunity to have evidence presented to the trial court to be considered on this issue and the failure of such a review was possible prejudicially injurious to the case of the Petitioner. The facts contained in this paragraph are within the personal knowledge of the Petitioner, Barry Joe Roberts and with the personal knowledge of those Affiants whose affidavits are attached as "Exhibits 4" through "27".

Further, the Petitioner, BARRY JOE ROBERTS, and members of his immediate family were misled by the

advice of Petitioner's trial counsel in that they were advised by said counsel that the trial site could not be moved from where it was held as a matter of law and that it was therefore unnecessary to request a change of venue in said cause. It is therefore urged that this mistaken advice of counsel influenced the Petitioner's major decision relating to the conduct of his defense such as whether or not he should plea bargain and it is accordingly argued that said Petition for Error Coram Nobis is appropriate. These allegations are supported by affidavits from Affiants attached as "Exhibits 28, 29 and 30" and by the personal knowledge of the Petitioner, BARRY JOE ROBERTS.

VI.

Accordingly, the Petitioner contends and would show that he is at present illegally confined in violation of the criminal laws of the State of Mississippi and of the United States of America; in violation of his rights under the Constitutions of the United States and the State of Mississippi as well as the laws thereunder applicable; specifically, the course of conduct pursued by the State of Mississippi is violative of the following rights owing Petitioner:

1. The right to the due process law under the Fourteenth Amendment to the Constitution of the United States of America;
2. The right to the equal protection of the laws as embodied in the Fourteenth Amendment of the United States Constitution;
3. The correlative right to the due process of law contained in Article 3, Section 14 of the Mississippi Constitution (1890);

4. The right to the due course of law as granted by Article 3, Section 24, of the Mississippi Constitution (1890).

WHEREFORE, premises considered, the Petitioner respectfully requests that a Writ of Error Coram Nobis be granted the Petitioner's behalf, and that often a hearing thereof, Petitioner be granted a new trial or discharged.

STATE OF MISSISSIPPI
COUNTY OF SUNFLOWER

Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, the within named, BARRY JOE ROBERTS, Petitioner, who stated on oath that the matters and facts set out in the foregoing Petition are true and correct and that those stated on information and belief are verily believed by him to be true as therein stated.

/s/ Barry Joe Roberts
Barry Joe Roberts

SWORN TO AND SUBSCRIBED before me, on this, the 2nd day of November, 1980.

/s/ Gennette McDowell
Notary Public

(Seal)

My Commission Expires: 4/9/84

CERTIFICATE

I, Cleve McDowell, Attorney at Law, hereby certify that I am the attorney of record in the above styled and numbered buse and further that it is my opinion that said application for Writ of Error Coram Nobis has Merit.

This the 2nd day of November, 1980.

/s/ Cleve McDowell
Cleve McDowell

SWORN TO AND SUBSCRIBED before me, a notary public, this the 2nd day of November, 1980.

/s/ Gennette McDowell
Notary Public

(Seal)

My Commission Expires: 4/9/84

CERTIFICATE

I, Cleve McDowell, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing Petition for Writ of Error Coram Nobis or in the Alternative for Writ of Habeaus Corpus to the Honorable Bill Allain, Attorney General of the State of Mississippi, at his usual business of Post Office Box 220, Jackson, Mississippi 39205.

This, the 2nd day of November, 1980.

/s/ Cleve McDowell
Cleve McDowell

"EXHIBIT 1"

STATE OF MISSISSIPPI
COUNTY OF Tallahatchie

AFFIDAVIT

I, George Stokes, an adult Citizen of Tallahatchie County, Mississippi, whose address is Charleston, Miss. 38921, first being sworn, hereby state that I was a member of the Grand Jury of Tallahatchie County, Mississippi, which indicted BARRY JOE ROBERTS for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that George Stokes, is and was a relative of the deceased child in question, also served on the same Grand Jury with me.

/s/ George Stokes
Affiant

SWORN to and subscribed before me, a Notary Public, this the 1st day of October, 1980.

/s/ Sandra Brett Johnson
Notary Public

(Seal)

My Commission Expires: Jan. 1984

"EXHIBIT 2"

STATE OF MISSISSIPPI)
)
 COUNTY OF SUNFLOWER)

AFFIDAVIT

I, H. D. ROBERTS, an adult Citizen of Tallahatchie County, Mississippi, father of BARRY JOE ROBERTS, on or about September 30, 1980, was told by NICK P. SHERMAN, foreman of the Grand Jury which indicted my son, that "He was the first on the scene of the accident and that he was angry that he was not called by the prosecution as a witness."

Dated: October 5, 1980.

/s/ H. D. Roberts
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 5th day of October, 1980.

/s/ Gennette McDowell
 Notary Public

(Seal)

My Commission Expires: 4/9/84

"EXHIBIT 3"

Tallahatchie Co., Ms.
1st District

Grand Jury Dec. 1977

NAMES AND ADDRESSES OF THE GRAND JURY

NICK P. SHERMAN - Route 1 Enid, Ms. 38927

OLIVER WILLIAMS - P. O. BOX 352 Charleston, Ms. 38921

CHARLES E. JOHNSON - 709 North Sarah St. Charleston,
Ms. 38921

(Dead) BESSIE R. HOLLAND - Route 1 Box 88 Tillatoba,
Ms. 38961

WILLIAM EDWARD HOLLAND - Tillatoba, Ms. 38961

GEORGE STOKES, JR. - Route 1 Enid, Ms. 38927

CHARLES D. ORR - 209 N. Franklin Charleston, Ms. 38921

JESSIE RAY HARDY - Tippo, Ms. 38962

LARRY J. HILLHOUSE - 207 Sabine St. Charleston, Ms.
38921

JUDY P. SHAW - Route 2 Box 335 Holcomb, Ms. 38940

Emanuel L. Owen - 101 Franklin Charleston, Ms. 38921

Lucille J. Roberson - Route 1 Highway 32E Charleston,
Ms. 38921

MILDRED L. ROWE - P. O. Box 99 Charleston, Ms. 38921

CORA B. BLAND • 806 North Sarah Street or P. O. Box
331 Charleston, Ms. 38921

GLADYS DAWSON - 321 So. Holly St. Charleston, Ms.
38921

BETTY B. SWEARENGEN - Philipp, Ms. 38950

RICHARD L. GARDNER - 199 Depot St. Charleston, Ms.
38921

"EXHIBIT 4"

STATE OF MISSISSIPPI
COUNTY OF Tallahatchie

AFFIDAVIT

I, George Stokes, an adult Citizen of Tallahatchie County, Mississippi, whose address is Charleston, Miss. 38921, first being sworn, hereby state that I was a member of the Grand Jury of Tallahatchie County, Mississippi, which indicted BARRY JOE ROBERTS for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that I did not understand the charges and penalties for the alleged crime at the time I voted and had I so understood the matter, my vote could have been different.

/s/ George Stokes
Affiant

SWORN to and subscribed before me, a Notary Public, this the 1st day of October, 1980.

/s/ Sandra Brett Johnson
Notary Public

(Seal)

My Commission Expires: Jan. 1984

"EXHIBIT 5"

STATE OF MISSISSIPPI
COUNTY OF Tallahatchie

AFFIDAVIT

I, Emanuel L Owen, an adult Citizen of Tallahatchie County, Mississippi, whose address is 207 N Pleasant Charleston Ms., first being sworn, hereby state that I was a member of the Grand Jury of Tallahatchie County, Mississippi, which indicted BARRY JOE ROBERTS for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that I did not understand the charges and penalties for the alleged crime at the time I voted and had I so understood the matter, my vote could have been different.

/s/ Emanuel L Owen
Affiant

SWORN to and subscribed before me, a Notary Public, this the 30th day of Sept., 1980.

/s/ Paul Eastridge
Notary Public
by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 6"

STATE OF MISSISSIPPI
COUNTY OF Tallahatchie

AFFIDAVIT

I, Gladys Dawson, an adult Citizen of Tallahatchie County, Mississippi, whose address is 321 Holly St. Charleston, Miss. 38921, first being sworn, hereby state that I was a member of the Grand Jury of Tallahatchie County, Mississippi, which indicted BARRY JOE ROBERTS for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that I did not understand the charges and penalties for the alleged crime at the time I voted and had I so understood the matter, my vote could have been different.

/s/ Gladys Dawson
Affiant

SWORN to and subscribed before me, a Notary Public, this the 1st day of October, 1980.

/s/ Paul J. Eastridge
Notary Public

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 7"

STATE OF MISSISSIPPI
COUNTY OF Tallahatchie

AFFIDAVIT

I, Richard L. Gardner, an adult Citizen of Tallahatchie County, Mississippi, whose address is 199 Depot St. Charleston, Ms. 38921, first being sworn, hereby state that I was a member of the Grand Jury of Tallahatchie County, Mississippi, which indicted BARRY JOE ROBERTS for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that I did not understand the charges and penalties for the alleged crime at the time I voted and had I so understood the matter, my vote could have been different.

/s/ Richard L. Gardner
Affiant

SWORN to and subscribed before me, a Notary Public, this the 9th day of October, 1980.

/s/ Nick Denly
Notary Public

(Seal)

My Commission Expires: January 1, 1984

"EXHIBIT 8"

STATE OF MISSISSIPPI
COUNTY OF TALLAHATCHIE

AFFIDAVIT

I, Charles Johnson, an adult Citizen of Tallahatchie County, Mississippi, whose address is 709 North Sarah St. Charleston Ms., first being sworn, hereby state that I was a member of the Grand Jury of Tallahatchie County, Mississippi, which indicted BARRY JOE ROBERTS for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that I did not understand the charges and penalties for the alleged crime at the time I voted and had I so understood the matter, my vote could have been different.

/s/ Charles Johnson
Affiant

SWORN to and subscribed before me, a Notary Public, this the 18th day of October, 1980.

/s/ Robert C. Kegl
Notary Public

(Seal)

My Commission Expires: 3-5-83

"EXHIBIT 9"

STATE OF MISSISSIPPI
COUNTY OF Tallahatchie

AFFIDAVIT

I, W. E. Holland Jr., an adult Citizen of Tallahatchie County, Mississippi, whose address is Rt 1, Box 88, Tillatoba, Ms. 38961, first being sworn, hereby state that I was a member of the Grand Jury of Tallahatchie County, Mississippi, which indicted BARRY JOE ROBERTS for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that I did not understand the charges and penalties for the alleged crime at the time I voted and had I so understood the matter, my vote could have been different.

/s/ W. E. Holland Jr.
Affiant

SWORN to and subscribed before me, a Notary Public, this the 13 day of Oct., 1980.

/s/ (Illegible)
Notary Public

(Seal)

My Commission Expires: March 18, 1981

"EXHIBIT 10"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, Fred D. Dungan, an adult Citizen of Tallahatchie County, Mississippi, whose address is Route 1, Charleston, Mississippi, first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ Fred D. Dungan
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 15th day of October, 1980.

/s/ (Illegible)
 Notary Public

(Seal)

My Commission Expires: 10-2-83

"EXHIBIT 11"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, Verna Mae Irwin, an adult Citizen of Tallahatchie County, Mississippi, whose address is 705 N. Marshall, Charleston, Miss., first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from a automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ Verna Mae Irwin
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 1st day of October, 1980.

/s/ Paul Eastridge
 Notary Public
 by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 12"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, Herman Irwin, an adult Citizen of Tallahatchie County, Mississippi, whose address is 705 N. Marshall, Charleston, Miss., first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ Herman Irwin
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 1st day of October, 1980.

/s/ Paul Eastridge
 Notary Public

by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 13"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, Ann H. Wrenn, an adult Citizen of Tallahatchie County, Mississippi, whose address is Rt. #1 Enid, Miss. 38927, first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ Ann H. Wrenn
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 29th day of September, 1980.

/s/ Paul Eastridge
 Notary Public

by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 14"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, W. D. Wrenn, an adult Citizen of Tallahatchie County, Mississippi, whose address is Rt. #1 Enid, Miss. 38927, first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ W. D. Wrenn
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 29th day of September, 1980.

/s/ Paul Eastridge
 Notary Public

by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 15"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, Tommy Young, an adult Citizen of Tallahatchie County, Mississippi, whose address is Rt. # 1, Charleston, Miss., first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ Tommy Young
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 1st day of October, 1980.

/s/ Paul Eastridge
 Notary Public
 by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 16"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, Lizzie Bess Young, an adult Citizen of Tallahatchie County, Mississippi, whose address is Route 1, Charleston, Miss., first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ Lizzie Bess Young
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 1st day of October, 1980.

/s/ Paul Eastridge
 Notary Public
 by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 17"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, C. T. Shaw, an adult Citizen of Tallahatchie County, Mississippi, whose address is Route 1, Charleston, Ms. 38921, first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ C. T. Shaw
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 1st day of October, 1980.

/s/ Nick Denley
 Notary Public

(Seal)

My Commission Expires: January 1, 1984

"EXHIBIT 18"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, Beatrice Nelson, an adult Citizen of Tallahatchie County, Mississippi, whose address is Charleston, Miss., R. 1, first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ Beatrice Nelson
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 3rd day of October, 1980.

/s/ Paul Eastridge
 Notary Public

by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 19"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, George D. Allen, an adult Citizen of Tallahatchie County, Mississippi, whose address is P.O. Bx 402, Charleston, Ms. 38921, first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ George D. Allen
 Affiant

SWORN to and subscribed before me, a Notary Public this the 5th day of October, 1980.

/s/ (Illegible)
 Notary Public

(Seal)

My Commission Expires: January 1, 1984

"EXHIBIT 20"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, Maifred Allen, an adult Citizen of Tallahatchie County, Mississippi, whose address is, Oakland, Rt. 2 38948, first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ Maifred Allen
 Affiant

SWORN to and subscribed before me, a Notary Public this the 3rd day of October, 1980.

/s/ Paul Eastridge
 Notary Public

by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 21"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, Juanita L. Allen, an adult Citizen of Tallahatchie County, Mississippi, whose address is Charleston Miss., first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ Juanita L. Allen
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 3rd day of October, 1980.

/s/ Paul Eastridge
 Notary Public

by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 22"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, William Earl Douglas, an adult Citizen of Tallahatchie County, Mississippi, whose address is Rt. 2 Oakland, Ms., first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been elsewhere.

/s/ William Earl Douglas
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 2nd day of October, 1980.

/s/ Paul Eastridge
 Notary Public

by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 23"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, Charles B. Shankle, an adult Citizen of Tallahatchie County, Mississippi, whose address is P.O. Box 12 Charleston, Ms 38921, first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ Charles B. Shankle
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 3rd day of Oct., 1980.

/s/ Paul Eastridge
 Notary Public
 by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 24"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, Jim Newton, an adult Citizen of Tallahatchie County, Mississippi, whose address is Rt. 1 Box 323, Charleston, MS 38921, first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ Jim Newton
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 3rd day of October, 1980.

/s/ Paul Eastridge
 Notary Public

by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 25"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, J W Kuykendall Jr, an adult Citizen of Tallahatchie County, Mississippi, whose address is Rt 2 Box 96, Oakland, Ms., first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ J W Kuykendall Jr
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 2nd day of October, 1980.

/s/ Paul O Eastridge
 Notary Public

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 26"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, Rosa E. Kuykendall, an adult Citizen of Tallahatchie County, Mississippi, whose address is Rt 2, Box 96, Oakland, Miss, first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ Rosa E. Kuykendall
Affiant

SWORN to and subscribed before me, a Notary Public, this the 2nd day of October, 1980.

/s/ Paul Eastridge
 Notary Public
 by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 27"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, J W Kuykendall, Sr., an adult Citizen of Tallahatchie County, Mississippi, whose address is Oakland, MS. R-2, first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ J W Kuykendall
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 2nd day of October, 1980.

/s/ Paul O Eastridge
 Notary Public

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 28"

STATE OF MISSISSIPPI
COUNTY OF TALLAHATCHIE

AFFIDAVIT

I, Sadie Roberts, an adult Citizen of Tallahatchie County, Mississippi, whose address is Rt. 1 Charleston Ms., first being sworn, hereby state that I am the Mother of BARRY JOE ROBERTS and that prior to and during the trial of BARRY JOE ROBERTS for manslaughter in Tallahatchie County, Mississippi, I was told by Mr. J.W. Kellum, Attorney for BARRY JOE ROBERTS, that his trial could not be moved from where it was held (Charleston, Mississippi) and that there was no need to request a change of venue.

/s/ Sadie L. Roberts
Affiant

SWORN to an subscribed before me, a Notary Public,
this the 2nd day of October, 1980.

/s/ Paul Eastridge
Notary Public
by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 29"

STATE OF MISSISSIPPI

COUNTY OF TALLAHATCHIE

AFFIDAVIT

I, Mona Roberts, an adult Citizen of Tallahatchie County, Mississippi, whose address is Rt. 1, Charleston, Miss., first being sworn, hereby state that I am the wife of BARRY JOE ROBERTS and that prior to and during the trial of BARRY JOE ROBERTS for manslaughter in Tallahatchie County, Mississippi, I was told by Mr. J.W. Kellum, Attorney for BARRY JOE ROBERTS, that his trial could not be moved from where it was held (Charleston, Mississippi) and that there was no need to request a change of venue.

/s/ Mona Roberts
Affiant

SWORN to and subscribed before me, a Notary Public, this the 3rd day of October, 1980.

/s/ Paul Eastridge
Notary Public

by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 30"

STATE OF MISSISSIPPI
COUNTY OF PANOLA

AFFIDAVIT

I, Mrs. Carrie M. Doty, an adult Citizen of Panola County, Mississippi, whose address is Rt. 2, Bates, Miss. 38606, first being sworn, hereby state that I am the Mother in Law of BARRY JOE ROBERTS and that prior to and during the trial of BARRY JOE ROBERTS for manslaughter in Tallahatchie County, Mississippi, I was told by Mr. J.W.Kellum, Attorney for BARRY JOE ROBERTS, that his trial could not be moved from where it was held (Charleston, Mississippi) and that there was no need to request a change of venue.

/s/ Mrs. Carrie M. Doty
Affiant

SWORN to and subscribed before me, a Notary Public,
this the 3 day of October, 1980.

/s/ Robert L. Carter
Circuit Clerk

By /s/ Louise R. Davis, D.C.

(Seal)

My Commission Expires: 1-2-1984

IN THE
SUPREME COURT OF THE STATE
OF MISSISSIPPI

Misc. No.

BARRY JOE ROBERTS,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

**MOTION FOR LEAVE TO FILE APPLICATION FOR
WRIT OF ERROR CORAM NOBIS OR IN THE AL-
TERNATIVE FOR WRIT OF HABEAUS CORPUS**

COMES NOW, the Petitioner, BARRY JOE ROBERTS, by and through Attorney, Cleve McDowell, and respectfully moves this Court pursuant to the provisions of Section 99-35-145 of the Mississippi Code of 1972, as Amended, and Rule 38 of the Rules of the Supreme Court of Mississippi, to grant this his petition for leave to file an application for a writ of error coram nobis in the Circuit Court of Tallahatchie County, Mississippi, or in the alternative, entertain a Writ of Habeaus Corpus in Petitioner's behalf; in support of which, of Petitioner would show the following:

I.

"THE TRIAL COURT ERRED IN PERMITTING THE PETITIONER TO BE INDICTED AND TRIED UPON A SET OF FACTS AND CIRCUMSTANCES WHICH FORMED THE BASIS FOR PREVIOUS JUSTICE COURT CHARGES FOR WHICH THE PETITIONER HAD BEEN TRIED, CONVICTED, AND SENTENCED."

II.

"THE TRIAL COURT ERRED IN VACATING ITS ORDER DENYING APPELLANT A SPECIAL VENIRE AND IN LATER DURING THE TRIAL DECLARING THAT A SPECIAL VENIRE HAD IN FACT BEEN GIVEN AND PETITIONER'S TRIAL ATTORNEY WAS NEGLIGENT IN NOT OBJECTING TO SAME."

III.

"THE TRIAL COURT ERRED IN PERMITTING THE STATE TO CONSOLIDATE THE MISDEMEANOR APPEALS (TALLAHATCHIE CIRCUIT COURT NUMBERS 4266, 4267, 4268, and 4269) AND TO RECEIVE EVIDENCE RELATING TO SAME DURING TRIAL OF THE RELATED FELONY COUNT (NO. 4265) AND APPELLANT'S TRIAL ATTORNEY WAS GROSSLY NEGLIGENT IN NOT OBJECTING TO SAME."

IV.

"THE LEGAL REPRESENTATION OF THE PETITIONER AT THE TRIAL LEVEL AND AT THE INITIAL APPELLATE SUBMISSION WAS GROSSLY INCOMPETENT AND PREJUDICIALLY NEGLIGENT AND ENTITLES THE PETITIONER TO A NEW TRIAL."

V.

Accordingly, the Petitioner contends and would show that he is at present illegally confined in violation of the criminal laws of the State of Mississippi and of the United States of America; in violation of his rights under the Constitutions of the United States and the State of Mississippi as well as the laws thereunder applicable; specifi-

cally, the course of conduct pursued by the State of Mississippi is violative of the following rights owing Petitioner:

1. The right to the due process of law under the Fourteenth Amendment of the Constitution of the United States of America;

2. The right to the equal protection of the laws as embodied in the Fourteenth Amendment of the United States Constitution;

3. The correlative right to the due process of law contained in Article 3, Section 14 of the Mississippi Constitution (1890);

4. The right to the due course of law as granted by Article 3, Section 24 of the Mississippi Constitution (1890).

WHEREFORE, premises considered, the Petitioner respectfully requests that leave to file an application for a Writ of Error Coram Nobis be granted the Petitioner or in the alternative entertain a Writ of Habeas Corpus in Petitioner's behalf.

EXHIBIT "2b"

**IN THE
SUPREME COURT OF THE STATE
OF MISSISSIPPI**

MISC. NO.

**BARRY JOE ROBERTS,
Petitioner,**

vs.

**STATE OF MISSISSIPPI,
Respondent.**

**BRIEF IN SUPPORT OF APPLICATION FOR
LEAVE TO FILE WRIT OF ERROR CORAM NOBIS
OR IN THE ALTERNATIVE FOR WRIT
OF HABEAUS CORPUS**

INTRODUCTION

Petitioner's application for leave to file a Petition for Writ of Error Coram Nobis complies with the provisions of Rule 38 of the "Rules of the Supreme Court of Mississippi." Rule 38 States:

Every application for leave to file a Petition for Writ of Error Coram Nobis in the lower Court shall have attached thereto the original and two executed counter parts of the Petition proposed to be filed in the lower court, which shall be sworn to by Petitioner.

Petitioner's affidavit shall designate specifically what facts, if any, alleged in the petition are within the personal knowledge of petitioner. When the petition contains allegations of facts not within the personal

knowledge of Petitioner, it shall have attached affidavit or affidavits of some other person or persons having knowledge of the facts which are not within the personal knowledge of petitioner. The failure to attach such affidavits of persons other than petitioner may be excused upon good cause shown.

The petition shall state when the facts relied upon for issuance of the writ came to petitioner's knowledge, and shall state sufficient facts to show that there was no want of reasonable diligence on the part of petitioner or his counsel.

The petition shall be endorsed by a statement by petitioner's Counsel, if any, that he believes the Petition for Writ of Error Coram Nobis is well taken, and should be issued.

The application shall be supported by a brief, and failure to file a supporting brief may be ground for dismissal.

In the event leave is granted to file the petition, the original and one executed counterpart of the petition shall be withdrawn and filed in the lower court.

This Rule has been upheld by the Mississippi Supreme Court in the following cases: *Riley v. State*, 254 Miss. 487, 182 So.2d 397, 183 So.2d 819 (1966); *Knight v. State*, 204 So.2d 568 (Miss. 1967); *Diddlemeyer v. State*, 234 So.2d 292 (Miss. 1970); *Tarrant v. State*, 236 So.2d 360 (Miss. 1970); *Brown v. State*, 275 So.2d 103 (Miss. 1973); *Auman v. State*, 285 So.2d 146 (Miss. 1973).

I.

"THE TRIAL COURT ERRED IN PERMITTING THE PETITIONER TO BE INDICTED AND TRIED UPON A SET OF FACTS AND CIRCUMSTANCES WHICH FORMED THE BASIS FOR PREVIOUS JUSTICE COURT CHARGES FOR WHICH THE PETITIONER HAD BEEN TRIED, CONVICTED, AND SENTENCED."

In many jurisdictions, if a minor offense is embraced within a higher crime as a constituent element or component part, and on the trial of the higher offense there could be a conviction of the minor offense, a conviction of the minor offense will bar a prosecution for the higher crime. *State v. Blevins*, 134 Ala 213, 32 So 637, 92 Am St Rep 22. *People v. McDaniels*, 137 Cal 192, 69 P 1006, 59 LRA 578, 92 Am St Rep 81; *People v. Ham Tong*, 155 Cal 579, 102 P 263, 24 LRA NS 481, 132 Am St Rep 110. *State v. Fox*, 83 Conn 286, 76 A 302, 19 Ann Cas 682. *Sanford v. State*, 75 Fla 393, 78 So 340. *Bell v. State*, 103 Ga 397, 30 SE 294, 68 Am St Rep 102. *State v. Elder*, 65 Ind 282, 32 Am Rep 69. *State v. Sampson*, 157 Iowa 257, 138 NW 473 42 LRA NS 967. *State v. Colgate*, 31 Kan 511, 3P 346, 47 Am Rep 507; *State v. McLaughlin*, 121 Kan 693, 249 P 612. Thus a prosecution for any part of a single crime bars any further prosecution based on the whole or a part of the same crime. *Hurst v. State*, 86 Ala 604, 6 So 120, 11 Am St Rep 79; *Trawick v. Birmingham*, 23 Ala App 308, 125 So 211, cert den 220 Ala 291, 125 So 212. *People v. Stephens*, 79 Cal 428, 21 P 856, 4 LRA 845. *Clem v. State*, 42 Ind 420, 13 Am St Rep 369; *Pivak v. State*, 202 Ind 417, 175 Ne 278, 74 ALR 406. *State v. Sampson*, 157 Iowa 257, 138 NE 473, 42 LRA NS 967. *State v. Colgate*, 31 Kan 511, 3 P 346, 47 Am Rep 507; *State v. McLaughlin*, 121 Kan 693, 249 P 612. *Runyon v. Morrow*, 192 Ky 785, 234 SW 304, 19 ALR 632. *State*

v. Tooms, 326 Mo 981, 34 SW2d 61. *State v. Mowser*, 92 NJL 474, 106 A 416, 4 ALR 695. *Wilson v. State*, 45 Tex 76, 23 Am Rep 602. *State v. Emery*, 68 Vt 109, 34 A 432, 54 Am St Rep 878. Conviction or acquittal of a lower degree is an implied acquittal of all higher degrees charges in the indictment. *Presnal v. State*, 23 Ala App 578, 129 So 480. *Roland v. People*, 23 Colo 283, 47 P 269. *West v. State*, 55 Fla 200, 46 So 93. *People v. McGinnis*, 234 Ill 68, 84 NE 687, 123 Am St Rep 73. *State v. Smith*, 132 Iowa 645, 109 NW 115; *State v. Smith*, 217 Iowa 645, 109 NW 115; *State v. Smith*, 217 825, 253 NW 130. *State v. Wooten*, 136 La 560, 67 So. 366. *Com. v. Mahoney*, 331 Mass 510, 120 NE2d 645. *People v. Farrell*, 146 Mich 264, 109 NW 440. *State v. Patterson*, 116 Mo 505, 22 SW 696. *State v. Greely*, 30 NJ Super 180, 103 A2d 639, Affd 31 NJ Super 542, 107 A2d 439. *People v. Cignarole*, 110 NY 23, 17 NE 135.

It is also held that if the acts of the accused committed by him at one time, when combined, charge but one crime, a single offense has been committed and only one punishment can be inflicted. *Ballerini v. Aderholt* (CA 5th) 44F 2d 352; *People v. Twedt* (CAL APP) 27 P 2d 90, Mod on other grounds in 1 Cal 2d 392, 35 P 2d 324.

The indictment in this case charged the defendant with manslaughter by culpable negligence on the part of the Petitioner BARRY JOE ROBERTS due to the negligent reckless manner in which he allegedly operated his vehicle (see certified copy of minutes from Justice Court attached as Exhibit "1"). The testimony presented to convict the Petitioner of the misdemeanor charges, bind him over for the grand jury and convict him in the Circuit Court trial was identical.

It is urged that an act or omission which is made punishable in different ways by different provisions of

the Mississippi Code may be punished under either of such provisions but in no case should punishment be issued more than one. Further, an acquittal (or conviction and sentence) of an act under either one should bar a prosecution for the same act or omission under any other.

II.

"THE TRIAL COURT ERRED IN VACATING ITS ORDER DENYING PETITIONER A SPECIAL VENIRE AND IN LATER DURING THE TRIAL DECLARING THAT A SPECIAL VENIRE HAD IN FACT BEEN GIVEN."

The purpose of a special venire facias is to aid in the selection of persons who can render an impartial verdict. It is urged in the instant case that such a tool was necessary for the proper defense of the Petitioner and further that he was prejudiced without receiving one. "Fair trial" requires that the accused's legal rights be safeguarded and respected by a fair and impartial jury. *Fisher v. State*, 110 So. 361, 145 Miss. 116. The Constitutional guarantees of a "fair and impartial trial," require fair, unprejudiced, unbiased individual jurors who are willing to be guided by the testimony given by the witnesses and the law as announced by the court and requires defendant to be tried in an atmosphere in which public opinion is not saturated by bias, hatred, and prejudice against defendant. U.S.C.A. Const. Amend. 6; Const. Miss. 1890, Sec. 26; *Seals v. State*, 44 So.2d 61, 208 Miss. 236. *Brooks v. State*, 46 So.2d 94, 209 Miss. 150; *Berry v. State*, 54 So.2d 222, 212 Miss. 164; *Dickerson v. State*, 54 So.2d 925.

The requirements of a special venire facias are set out by statute and so provisions for selecting additional jurors when the special panel has been exhausted. In the

instant case, a special venire was requested and was later during the course of the trial "declared" to have been granted. It is urged that if the trial judge later determined that a special venire was necessary and failed to grant the Petitioner the right to one, the later pronouncement that one had been "in effect given" was prejudicial to Petitioner.

III.

"THE TRIAL COURT ERRED IN PERMITTING THE STATE TO CONSOLIDATE THE MISDEMEANOR APPEALS AND TO RECEIVE EVIDENCE RELATING TO SAME DURING TRIAL OF THE RELATED FELONY COUNT."

More than one indictment against the same defendant or defendants charging related offenses may be consolidated for the purpose of trial in some instances (*Capone v. United States*, (CA 7th) 51 F2d 609, 76 ALR 1534, cert den 284 US 669, 76 L ed 566, 52 s ct 44), however, when the counts are so numerous as to embarrass the defense, or when, by reason of the nature of the offenses charged or because of the made of proof, there is possibility of prejudice to the defendant (*Mitchell v. Com.* 141 Va 541, 127 SE 368), the prosecution (*Pointer v. United States*, 151 US 396, 38 L ed 208, 14 s ct 410; *Sheppard v. State*, 104 Neb 709, 178 NW 616, 18 ALR 1074).

In the instant case, the jury heard evidence on related misdemeanor charges which were consolidated for appeal with the felony count for which the Petitioner was indicted. It is urged that this consolidation allowed the jury to hear evidence which otherwise would have been inadmissible on the felony indictment and that said evidence was confusing to the jury and thereby prejudicial to the Petitioner.

IV.

"THE LEGAL REPRESENTATION OF THE PETITION AT THE TRIAL LEVEL AND AT THE INITIAL APPELLATE SUBMISSION WAS GROSSLY INCOMPETENT AND PREJUDICIALLY NEGLIGENT AND ENTITLES THE PETITIONER TO A NEW TRIAL."

An accused is guaranteed the right to be represented by counsel by the United States Constitution and by most State constitution, and by statutes. An accused person is entitled to the benefit of counsel at every stage of a criminal prosecution. *Powell v. Alabama*, 287 US 45, 77 L ed 158, 53 s ct 55, 84 ALR 527. Counsel should have sufficient ability and experience to fairly represent the defendant, present his defense, and protect him from undue oppression. *Carlson v. People*, 91 Colo 418, 15 P2d 625. A defendant also has a right to have effective counsel. *Powell v. Alabama*, 287 US 45, 77 L ed 158, 53 s ct 55, 84 ALR 527; *Hawk v. Olson*, 326 US 271, 90 L ed 61, 66 set 116.

A new trial may be granted when the defendant's counsel has grossly mishandled the defense of a defendant. *People v. Gardiner*, 303 Ill 204, 135 NE 422; *State v. Gunter*, 30 LaAnn 536; *Roper v. Territory*, 7NM 255, 33P 1014.

In the instant case, it is urged that the failure of the Attorney for Petitioner to object to matters set out in this brief in numbers "I", "II" and "III" and other matters clearly establish that the Petitioner is entitled to show that his reputation was prejudicially incompetent and negligent.

Further, it is urged that Petitioner was advised that he could not request of change of venue. This advice was clearly in error and an application, if properly pleaded and supported by sufficient facts, makes out of a case where relief by petition for error coram nobis is appropriate. *Dunn v. Reed*, 309 So.2d 516 (Miss. 1975); *Baker v. State*, (Miss. - 1978) 358 So.2d 401.

EXHIBIT "1"

Page 280

Docket #1

GENERAL AFFIDAVIT**THE STATE OF MISSISSIPPI****TALLAHATCHIE COUNTY**

BEFORE ME Sandra Brett Johnson a Justice Court Judge of said County, in Justice District No. 1, Clinton Earl Bonner makes affidavit that Barry Joe Roberts on or about August 6, 1977, in the county aforesaid, in said Justice's District #1, did unlawfully and feloniously commit manslaughter, contrary to the statutes and—contrary to section 97-3-47 of Miss. Code 1972 as amended against the peace and dignity of the State of Mississippi.

/s/ Clinton Earl Bonner

Sworn to and subscribed before me, this 10th day of August, 1977.

/s/ Sandra Brett Johnson
Justice Court Judge

A Preliminary Hearing was held in my court for Barry Joe Roberts on this charge of manslaughter.

/s/ Sandra Brett Johnson
Justice Court Judge
Route One
Enid, Mississippi 38927

EXHIBIT "3"

**IN THE
SUPREME COURT OF THE STATE
OF MISSISSIPPI**

NO. 51,552

**BARRY JOE ROBERTS,
Appellant,**

vs:

**STATE OF MISSISSIPPI,
Appellee.**

STATEMENT OF CASE

This is a manslaughter conviction based on the culpable negligence statute because of the death of a child in an automobile-truck collision.

ACTION OF THE TRIAL COURT

After jury verdict against the appellant, the Court sentenced him to serve twenty years in the custody of the Mississippi Department of Corrections.

POINTS RAISED ON APPEAL

It was manifest, reversible error for the lower court to refuse appellant's motions for a peremptory instruction both at the close of the State's case and at the close of the entire case and to grant to the State instructions S-1 and S-2 (A. 7 & 8).

EXHIBIT "3a"

**IN THE
SUPREME COURT OF THE STATE
OF MISSISSIPPI**

NO. 51,552

**BARRY JOE ROBERTS,
Appellant,**

vs:

**STATE OF MISSISSIPPI,
Appellee.**

ASSIGNMENT OF ERRORS

Now comes Barry Joe Roberts, Appellant, by his attorney, and says that in the record and proceedings and in rendering the judgment in this case there is manifest, reversible error in this, to-wit:

1. Refusing to grant appellant's motions for a peremptory instruction both at the close of the State's case and at the close of the entire case.
2. Granting to the State instructions S-1 & S-2.

EXHIBIT "3b"**IN THE
SUPREME COURT OF THE STATE
OF MISSISSIPPI**

NO. 51,552

BARRY JOE ROBERTS,
Appellant,

vs:

STATE OF MISSISSIPPI,
Appellee.**BRIEF FOR APPELLANT****INTRODUCTORY**

Appellant, Barry Joe Roberts, under Section 97-3-47, Miss. Code, 1972 Ann., was indicted, tried, and convicted in the Circuit Court of the First Judicial District of Tal-lahatchie County at the May, 1978, term, for manslaughter, because of the death of a child in an automobile-truck col-lision, which allegedly was the result of culpable negli-gence on the part of appellant. He was sentenced to serve twenty years in the custody of the Mississippi Department of Corrections. He assigns as errors the failure of the lower court to sustain his motions for a peremptory in-struction both at the close of the State's case and at the close of the entire case; and the granting of the State's instructions S-1 & S-2.

STATEMENT OF FACTS

In the afternoon, about six p. m., on August 6, 1977, the appellant was driving his car on Highway 35 between

Charleston and Batesville. J. B. Byars was riding with him; about five miles north of Charleston a tape fell out of his tape player, fell under his legs, and he reach down to get it and as he looked back up he was off the shoulder of the black top road and on some gravel; he pulled the car back up on the road and he lost control of it and it started sliding sideways and he hit head-on a truck in which Mrs. Bonner was driving (in her correct lane) in a southerly direction; as a result of this collision, Mrs. Bonner's ten year old daughter, Brenda, was killed. She was riding in the back of the truck (with no side rails) with some other children. For a more detailed statement of Appellant's testimony see (A. 6).

ARGUMENT

We are unable to see any evidence of culpable negligence such as would come within the condemnation of the statute. *Smith v. State*, 197 Miss. 802, 20 So. 2d 701, 161 A.L.R. 1 (1945) and the authorities cited therein; *Gant v. State*, 244 So. 2d 18 (Miss. 1971).

Note the instructions given the State (A. 7 & 8), we invite this Honorable Court's attention to the similarity of the instruction in the Cutshall case cited in *Smith*, supra, where this Court said:

"the driving of a vehicle by one who is under the influence of intoxicating liquor is a misdemeanor.— The driving of an automobile while in this condition is therefore per se negligence—. But this does not mean that such evidence constitutes a prima facie case of manslaughter.—The same may be said in regard to the act of the defendant when he "carelessly and negligently . . . drove his car from the west side . . . to the east side of the road."

(197 Miss. at 814)

CONCLUSION

Hence, we submit that this case should be reversed and this appellant discharged; however, if we are mistaken in this particular, then we submit this case should be reversed and remanded.

EXHIBIT "3c"**IN THE
SUPREME COURT OF THE STATE
OF MISSISSIPPI**

NO. 51,552

BARRY JOE ROBERTS,
Appellant,

vs.

STATE OF MISSISSIPPI,
Appellee.**ABSTRACT OF RECORD**

Appellant, Barry Joe Roberts, was indicted, tried, and convicted in the circuit court of the first judicial district of Tallahatchie County for manslaughter, because of the death of a child in an automobile-truck collision, which allegedly was the result of culpable negligence on the part of appellant. He was sentenced to serve twenty years in the custody of the Mississippi Department of Corrections.

TESTIMONY OF STATE'S WITNESSES.**TESTIMONY OF J. C. RICHARDSON
(R. 34-39)**

I am J. C. Richardson and have been employed by the Mississippi Highway Patrol for twenty eight years; I'm Assistant Director of the Driver Improvement Bureau. I have the record of people that's suspended and revoked and handle all those cases. I have with me the record of Barry Joe Roberts. On August 6, 1977, he was under

suspension; on May 17, 1975, his drivers license had been revoked; he is eligible to have them restated now and was eligible on August 6, 1977, provided he would show proof of financial responsibility, but he has not yet shown proof of financial responsibility.

TESTIMONY OF LOUISE GOAD

(R. 39-46)

I am Louise Goad and operate a place of business, in which, among other things, I sell beer. Barry Joe Roberts came into my place between 5:30 P. M. and 6 P. M., on the 6th. day of August, 1977. He bought him and the boy that was with him a beer, and the best I recall, he carried a six pack with him. I could tell he had been excessively drinking; when he drove his car away from my place, he always spun off, slung gravel everywhere.

TESTIMONY OF E. J. DUNGAN

(R. 46-71)

I am E. J. Dungan; I live about five miles north of Charleston on Highway 35; I worked in law enforcement for about five years (with the Sheriff's office and the police at Charleston); on August 6, 1977, about 6:45 or 7 o'clock in the afternoon Barry Joe Roberts was driving by my house on Highway 35 in a northerly direction about ninety miles per hour; I went up to the scene of the accident; it happened in Mrs. Bonner's lane of the highway and she was the driver of the truck; I found Barry Joe near the woods about 200 yards from the wreck. He was just sitting there—sitting on a big mound of dirt with his head down. He was bleeding some, pretty well shook up I would say. It kinda—I don't know—he didn't seem to recognize us. As far as Barry Joe being under the influence of intoxicants or alcoholic beverages, I

couldn't swear to it. The pictures here truly show the condition of the truck, car, etc. after the wreck. There were six children and two adults in the pick-up. They all were hurt.

TESTIMONY OF W. T. BARKLEY

(R. 78-103)

I am W. T. Barkley; am a Minister of a church at Crowder; on August 6, 1977, about 6:45 or 7 o'clock p.m., my wife and I were riding in my car in a southerly direction on highway 35; a red maroon Ford pickup passed us going in the same direction; we were driving along behind this pickup and I seen a car approach coming from Charleston or the Charleston area, coming north, and I seen a cloud of dust fly up, and it was a car run off the road. And the car turned sideways when it went off the road; he jerked it back on the road and it turned sideways. When he come back up on the road he turned it back the other way and it turned sideways again. And when it turned sideways again, it slammed into the front of the pickup that was following ahead of me. It collided with the pickup over in the pickup's lane; the car broke into and come in the front of my car and went off into the west side of 35 Highway. When I went to the car it smelt like there was a beer truck wrecked rather than a car. I heard the passenger of that car say: "I told him to slow down; was going to have a wreck and kill somebody." But I never did hear the driver say anything that I recall. Some of the children were in the back of the pick-up which had no side rails. Highway 35 is a blacktop road about the same width of a regular highway. When I saw the car coming from the south towards the north, I would guess that it was 500 feet from the pick-up when the car hit the dust and the dust flew up. The dust was coming from the right side of the road as the

car was traveling north. The car come off the shoulder back onto the blacktop, he crossed up to the left and he cut it back and he crossed up again to the right and when he come off back up to the right, he crossed up again and the back end of his car hit the front end of the pickup; when got back on the road it was sideways on the highway; if that pickup truck, the way it stopped, if it were to back straight west off of the highway, it could have gone off without going into the ditch.

TESTIMONY OF MARGARET BARKLEY
(R. 103-116)

I am Margaret Barkley, wife of W. T. Barkley, and I was riding with him at the time of the wreck; the pickup with the children in it passed us going in the same direction we were going in. I could see it at all times until the accident. The impact broke the car into two pieces; the passenger in the car said: "I told him to slow down; that he was going to kill somebody." And he also said what made him leave the road in the first place, said he was messing with the tapes and things is what caused to leave the road in the first place. The pickup did not have any side rails.

TESTIMONY OF MARY ETTA BONNER
(R. 116-138)

I am Mary Etta Bonner, the driver of the pickup, and am the mother of Brenda Gayle who got killed in the wreck. In the pickup, besides myself, it was four of my children; Liz Tingle and her little three year old girl; and Mike Kilgore. I think he was about 16 or 17. In the back of the truck were Liz Tingle, her three year old child, my ten year old child, the little Kilgore boy, and my 15 year old daughter. On the day of the collision I was driving the pickup in a southerly direction on High-

way 35. I entered the highway about three and a half miles from where the accident took place; as I approached Sherman Creek I was driving about 35 miles per hour; when I first saw the car it was traveling at a high rate of speed, and the car left the road on the left. He was going north, and it went off the highway and it swerved back up into the highway, and then it just went in a spin and come over on my side of the road and hit me. And I just stopped. When I saw it coming at a high rate of speed and saw it leave the highway. I began to stop. I told my little girl that was sitting up front with us, I said, "My Lord, that car is going to hit us before it gets straightened up." By the time I said it, it had hit us. The collision occurred in my lane of traffic. Well, after it hit, I don't know how much time passed, but when I come to, I raised up off the steering wheel, and someone was trying to get the door open on my side, to get us out. And then I seen that my little boy was—he said, "oh mama, my leg." And I reached down to feel of his leg, and my little girl showed me that her leg was cut. I got out of the truck and walked to the back of the truck. That's when I saw Brenda. And I don't remember then until I got in the ambulance. The next thing I remember we was getting out at the hospital. All of us got hurt. I was in the hospital for three weeks. We had five in the backend the truck, four children and a grownup. I did not have any side rails on the pickup. I saw the car go off the blacktop. I saw that the car was out of control and went into a spin.

TESTIMONY OF DR. CHARLES WILSON TAINTOR
(R. 138-142)

I'm a physician and on August 6, 1977, about 8 P.M. I examined Brenda Gayle Bonner, a female, ten years of age and she was dead. I felt that she had a broken neck

and it was caused by the collision of the car with the pickup.

TESTIMONY OF THOMAS McCLOUD

(R. 143-162)

I am Thomas McCloud, an employee of the Mississippi Highway Patrol for about ten years. I investigate automobile accidents that occur on state highways; I investigated one that happened on Highway 35 north of Charleston on August 6, 1977, about 7:30 p. m.; I smelled alcohol on Barry Joe Roberts and he told me he had been drinking beer all afternoon. He had no drivers' license. In my opinion his ability to operate a motor vehicle was impaired as the result of his drinking. I have had no medical experience. I would not say that the man was not in shock.

STATE RESTS

MOTION FOR DIRECTED VERDICT

MOTION FOR DIRECTED OVERRULED

TESTIMONY OF DEFENDANT'S WITNESSES

TESTIMONY OF J. D. BYARS

(R. 174-194)

I am J. D. Byars and was the passenger with Barry Joe Roberts when he had the wreck with the Bonner pickup. I met Barry Joe on August 6, 1977, (have known him all my life) about one or two in the afternoon and got into his car to go riding with him. When I got in the car with him I didn't smell any alcoholic beverage. We drove to J. P. Selby's place and bought two cans of beer. We rode around and then we went to Mrs. Goad's place. We bought two twelve ounce cans of beer there. When he drove away from her place—he just drove away normal—did not spin off; about five or six o'clock, we left Charleston and drove north on Highway 35. We had a

wreck about six miles out of Charleston. A tape player vibrated out of the car and Barry Joe reached under his feet to get it and the car went off the right side of the road, and he grabbed—tried to cut it back up on the road and got sideways, and there was the pickup and we hit it—Barry Joe was driving around 60 miles per hour. When he went of on the right hand side, he hit the brakes and the car went sideways for about half a city block when we then hit the pickup. I never made any statement to him that if he didn't slow down down, somebody is going to get killed. I was hurt after the collision and an ambulance carried me to the hospital in Charleston where Dr. Lewis and Dr. Taintor waited on me.

TESTIMONY OF BARRY JOE ROBERTS
(R. 194-216)

I am Barry Joe Roberts; am 21 years of age; have lived in Charleston all my life; on August 6th of last year, 1977, I rode in my car with J. D. Byars; he got in my car with me about 1:30 or 2 that afternoon; we both bought two twelve ounce size can of beer (one for him and one for me)—we purchased this at Selby's Grocery—this was the first beer I drank that particular day; we messed around a few minutes and then we went to Goad's and bought two more cans—I didn't drink all of my second can. I didn't skid off when I left her place; I drove back to Charleston and started to go to Batesville going north on highway 35; a tape fell out of my tape player, fell up under my legs, and I reached down to get it, and looked back up and I was off the shoulder of the road. I pulled the car back up on the road and it went sideways, and I lost control of it. I couldn't do nothing with it—it started sliding sideways and I looked up and there was a truck and in a few minutes I hit it, and the car come apart. I don't remember nothing after I hit the truck—it just—the

car come apart and I went on one side of the road, and J. D. went on the other side of the road. When I first saw that pickup truck, I tried to straightened my car up and get off on the other side of the road, but it wouldn't do nothing. I just kept sliding. J. D. at no time ever said I was driving too fast. I had a DWI conviction in the city court at Charleston in 1972, and also another one in 1975.

DEFENDANT AND STATE REST

**DEFENDANT RENEWS HIS MOTION
FOR DIRECTED VERDICT**

S-1

The Defendant, BARRY JOE ROBERTS, has been charged by an Indictment with the crime of Manslaughter for having by his culpable negligence caused the death of BRENDA BONNER.

If you find from the evidence in this case beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis consistent with innocence that

- a) The deceased, BRENDA BONNER, was a living person; and
- b) That she died as a result of the Defendant's gross negligence demonstrating a reckless disregard for the safety of human life in operating a motor vehicle in a reckless manner, while under the influence of an intoxicant or alcoholic beverages, on the wrong side of Highway No. 35N while his operator's license had been revoked or suspended by the Department of Public Safety, and in hitting and striking a vehicle in which the Deceased was a passenger with the vehicle operated by the Defendant, then you shall find the Defendant guilty of Manslaughter.

If the State has failed to prove any one or more of these elements beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis consistent with innocence, they you shall find the Defendant not guilty.

(R. 230)

S. 2

Culpable negligence is as used in these instructions conduct which exhibits or manifests a wanton or reckless disregard for the safety of human life, or such indifference to the consequences of the Defendant's act under the surrounding circumstances as to render his conduct tantamount to wilfulness.

(R. 231)

(Filed March 23, 1981)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

v.

MORRIS THIGPEN, ET AL.,
Respondents.

ORDER

Upon due consideration of the petition for a writ of habeas corpus filed herein, it is

ORDERED:

That within 20 days of this date respondent shall file answer to the petition in accordance with Rule 5, Rules Governing §2254 Cases. It is further Ordered that the clerk of court shall serve by certified mail on respondent and the Attorney General of the State of Mississippi a copy of the petition and this order.

This, 19th day of March, 1981.

/s/ Charles M. Powers
United States Magistrate

(Filed March 23, 1981)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

CA NO. DC81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

versus

MORRIS THIGPEN, ET AL.,
Respondents.

**ANSWER AND RETURN TO PETITION
FOR WRIT OF HABEAS CORPUS**

COMES NOW Morris Thigpen, et al., respondents in the above styled and numbered matter and files this their Answer and Return to the Petition for Writ of Habeas Corpus filed herein and would show unto the Court the following:

I.

Respondents admit the allegations contained in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 16, 17, 18 and 19, of the Petition.

II.

Respondents deny the allegations contained in Paragraphs 14 Ground 1, 14 Ground 2, 14 Ground 3, 14 Ground 4, and 20.

III.

Respondents admit that the petitioner filed a petition for Writ of Error Coram Nobis or in the alternative petition for Writ of Habeas Corpus in the Supreme Court of Mississippi and that the issues before the Court *sub judice* were presented to that Court and further that the Court decided the matter adverse to the Petitioner; otherwise, the petitioner denies the remaining allegations contained in Paragraphs 12 and 13 of the Petition.

AFFIRMATIVE DEFENSES

Having fully answered the allegations contained in the Petition for Writ of Habeas Corpus, respondents would show unto the Court the following, to-wit:

A.

The petition fails to state a claim upon which relief may be granted.

B.

The petitioner has failed to exhaust his available state remedies.

AFFIRMATIVE MATTERS
PURSUANT TO RULE 5

Having responded to the allegations of the petition, respondents turn now to other Rule 5 requirements. See Rule 5, Rules Governing Section 2254 cases in the United States District Courts.

1.

Petitioner is lawfully in the custody of Eddie Lucas, Warden of the Mississippi State Penitentiary, serving a

twenty (20) year sentence for the crime of manslaughter imposed by the Circuit Court of the First Judicial District of Tallahatchie County, Mississippi in criminal action 4265. Thereafter, petitioner filed a notice of appeal to the Supreme Court of Mississippi whereupon the conviction was affirmed.

2.

Respondents submit that petitioner has exhausted all of his available state remedies and further that if any are available to him resort to such would be futile.

3.

Respondents submit that the record of the trial proceedings conducted in the state courts does embody all of the facts relevant to the issues raised in the habeas petition. All briefs, Abstracts of the Record, Assignments of Error, Petitions and Responses to such for collateral relief and all other pleadings, documents, etc. relevant to the petition are filed herewith.

4.

A copy of the record of the proceedings conducted in the State Court is submitted herewith. Respondents know of no proceedings which were recorded but not transcribed.

WHEREFORE PREMISES CONSIDERED, respondents respectfully pray that the Petition for Writ of Habeas Corpus be dismissed.

THE STATE OF MISSISSIPPI)
)
1ST. DIST. TALLAHATCHIE COUNTY)

THE GRAND JURORS of the State of Mississippi, taken from the body of the good and lawful citizens of 1st Dist. Tallahatchie County thereof, duly elected, empaneled, sworn and charged to inquire in and for said County and State aforesaid, at the Term aforesaid of the Court aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present: That BARRY JOE ROBERTS late of the County aforesaid, on or about the 6th day of August, in the year of our Lord, 1977, in the County and State aforesaid, and within the jurisdiction of this Court, did unlawfully, willfully and feloniously, kill and slay one BRENDA BONNER, a human being, by culpable negligence, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

/s/ (Illegible)

District Attorney.

/s/ (Illegible)

Foreman of the Grand
Jury.

(Filed December 9, 1977)

CAPIAS—Circuit Court

#4265

THE STATE OF MISSISSIPPI,)
 FIRST JUDICIAL DISTRICT)
 TALLAHATCHIE COUNTY)

TO THE SHERIFF OF SAID COUNTY, GREETINGS:

We command you to take the body of BARRY JOE ROBERTS, it to be found in your County, and him safely keep, so that you have his body before the Honorable Circuit Court of said District, County and State, to be holden at the Court House thereof, in the Town of Charleston, on the Instant, A.D. 1977, then and to answer unto the State of Mississippi, on a bill of indictment found by the Grand Jury of said County, for manslaughter contrary to the Statutes of the State, in such cases made and provided, and against the peace and dignity of the State of Mississippi. Herein fail not and have you then and there this writ, with the manner in which you have executed the same.

Witness my hand and seal of office, in Charleston, Mississippi, this the 8th day of December, A.D., 1977.

/s/ Paul Eastridge, Clerk

By /s/ Nanette (Illegible), D.C.

(Filed January 27, 1978)

IN THE
CIRCUIT COURT OF THE FIRST JUDICIAL
DISTRICT OF TALLAHATCHIE COUNTY,
MISSISSIPPI

TUESDAY, DECEMBER 13, 1977

No. 4265

STATE OF MISSISSIPPI,

vs.

BARRY JOE ROBERTS.

ARRAIGNMENT

**MOTION FOR DISCOVERY AND MOTION
FOR SPECIAL VENIRE**

(The following proceedings were held in open court in the courthouse of the First Judicial District of Tallahatchie County, Charleston, Mississippi. The Defendant was present with his attorney Honorable J. W. Kellum. The State was represented by the Honorable Donald Whitten, County Attorney. Judge Dick R. Thomas presiding.)

* * *

Court: * * * Now, what about all these appeals? Are they to be continued generally?

Whitten: Mr. Kellum says he's of the opinion that we should probably try them all together. They are all—they are misdemeanors leading up to the felony charge.

Court: All right, continue all to the same date. Put that in the order, please, sir.

4266, 4267, 4268 and 4269, all being State versus Barry Joe Roberts, appealed from Justice of the Peace Court,

are hereby continued and set concurrent with the 4267 on the 17th day of May, 1978.

All rights and motions, etcetera are preserved unto the Defendant for motion by counsel.

Kellum: Thank you, sir.

This is to certify that the above transcription is a true and correct transcription of my shorthand notes taken in said cause.

/s/ (Illegible)

Court Reporter

December 14, 1977

TRANSCRIPT OF TESTIMONY

[1] IN THE
CIRCUIT COURT OF THE FIRST JUDICIAL
DISTRICT OF TALLAHATCHIE COUNTY,
MISSISSIPPI

No. 4265

STATE OF MISSISSIPPI,

vs.

BARRY JOE ROBERTS,
Defendant.

TRIAL ON INDICTMENT FOR MANSLAUGHTER

PRESIDING:

Honorable Dick R. Thomas, Presiding Judge of the
Seventeenth Judicial District of the State of
Mississippi

APPEARANCES:

FOR THE STATE OF MISSISSIPPI:

Honorable Robert Williams, District Attorney Pro
Tempore, Southaven, Mississippi

Honorable Richard Phillips, Assistant District At-
torney Pro Tempore, Batesville, Mississippi

Honorable Donald Whitten, County Prosecuting
Attorney, Charleston, Mississippi.

FOR THE DEFENDANT:

Honorable J. W. Kellum, Attorney at Law, Post
Office Box 175, Sumner, Mississippi

PLACE OF TRIAL:

Courtroom in the Courthouse of the First Judicial District of Tallahatchie County, Charleston, Mississippi

DATE OF TRIAL:

Monday and Tuesday, May 29, 30, 1978

• • •

[143] IN CHAMBERS

(The following proceedings take place in chambers out of the presence of the Jury. The Defendant is represented in chambers by his counsel.)

BY MR. WILLIAMS: For the record, as the Court and Mr. Kellum may recall, in the preliminaries of this trial that's in progress, the Court ruled that Cause Numbers 4266, 4267, 4268, and 4269—

BY THE COURT: Wait just a minute. Did you waive the presence of your client here in chambers for this purpose?

BY MR. KELLUM: Yes, sir.

BY THE COURT: Let the record so reflect. Go.

BY MR. WILLIAMS: Those four cause numbers which I just mentioned were appeals from misdemeanor convictions in JP Court, Beat One. The Court may recall it ruled for the purpose of trial that these matters would be consolidated with 4265, which is the case in progress. The State would now move the Court for leave to sever from Cause 4265 Cause Numbers 4266, 4267, 4268 and 4269, and for further authority to remand those four cause numbers to the file.

[144] BY THE COURT: Does the Defendant interpose any objection to that?

BY MR. KELLUM: No objection.

BY THE COURT: Let the record so reflect.

* * *

[205] IN OPEN COURT

(The following proceedings take place in open court with the Jury seated in the Jury Box. The Defendant is present in open court, seated at counsel table with his counsel.

The jury instructions were read to the Jury by the Court. Opening arguments for the State were made by Mr. Donald Whitten. Mr. Kellum made the final argument for the Defendant, and then Mr. Williams made the closing argument for the State.

At 5:25 p.m. the Jury retired to its quarters to consider its verdict. At 6:15 p.m., the Jury returned to the courtroom when and where the following proceedings took place.)

BY THE COURT: I know there is a lot of feeling but I would ask you to maintain order when the Jury returns its verdict. Bring them in.

(At this point, the Jury is escorted back into the courtroom.)

BY THE COURT: Has the Jury reached its verdict?

JUROR (Unidentified): Yes, sir.

BY THE COURT: Would you hand it to the Clerk, please?

(At this point in the proceedings, the Juror hands the verdict of the Jury to the Clerk. The Clerk in turn hands

the verdict to the Court for his inspection. The Court returns the verdict [206] to the Clerk where and when the following proceedings take place in open Court.)

BY THE COURT: Will the Defendant rise with counsel?

(At this point, the Defendant stands with his attorney.)

BY THE COURT: Will the Clerk read the verdict of the Jury?

BY THE CLERK (Mr. Eastridge): "We, the Jury, find the Defendant guilty as charged."

BY MR. KELLUM: May it lease the Court, we would like to have the Jury polled.

BY THE COURT: All right, sir.

(At this point, the Jury is polled by the Court.)

BY THE COURT: Let the record show that it was an unanimous verdict

You have discharged your duties. Those of you who are on the special venire are excused finally, and we have one juror who is from the regular panel—if you are on the regular panel, be back at 1:30 tomorrow.

(At this point, the Jury leaves the Courtroom. Presently, [207] these proceedings take place.)

BY THE COURT: The Court will order a pre-sentence investigation to be held by the probation officer and upon receiving that report, I will pass sentence on this Defendant on Monday, the 12th of June, on the first day of the opening term of Court in Hernando, Mississippi. They will have ample time to conduct the pre-sentence investigation.

Sheriff, will you notify the probation officer, Mr. Steele, please, and it will be handled at that time. We will be back here at 1:30 tomorrow.

(At this point, there was discussion off the record.)

BY THE COURT: I will reserve all of your rights either to be heard at the time of sentence or another hearing. The Defendant is remanded to the custody of the Sheriff until he appears up in Hernando at 8:30 Monday, June 12th.

Case 4265

(Filed May 24, 1978)

S.

The Defendant, BARRY JOE ROBERTS, has been charged by an Indictment with the crime of Manslaughter for having by his culpable negligence caused the death of BRENDA BONNER.

If you find from the evidence in this case beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis consistent with innocence that

- a) The deceased, BRENDA BONNER, was a living person; and
- b) That she died as a result of the Defendant's gross negligence demonstrating a reckless disregard for the safety of human life in operating a motor vehicle in a reckless manner, while under the influence of an intoxicant or alcoholic beverages, on the wrong side of Highway No. 35N while his operator's license had been revoked or suspended by the Department of Public Safety, and in hitting and striking a vehicle in which the Deceased was a pas-

senger with the vehicle operated by the Defendant, then you shall find the Defendant guilty of Manslaughter.

If the State has failed to prove any one or more of these elements beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis consistent with innocence, then you shall find the Defendant not guilty.

S.

Culpable negligence is as used in these instructions conduct which exhibits or manifests a wanton or reckless disregard for the safety of human life, or such indifference to the consequences of the Defendant's act under the surrounding circumstances as to render his conduct tantamount to wilfulness.

D-1

The Court instructs the jury that "culpable negligence" as used in this case is negligence of a higher degree than that which in civil cases is held to be gross negligence, and must be tantamount to a wanton disregard of, or utter indifference to, the safety of human life, so clearly evidenced as to place it beyond every reasonable doubt; and if, from the evidence or lack of evidence in this case you entertain a reasonable doubt as to the defendant's guilt (as to culpable negligence) then it is your sworn duty to find him not guilty.

IN THE CIRCUIT COURT OF THE FIRST
JUDICIAL DISTRICT OF TALLAHATCHIE COUNTY,
MISSISSIPPI

MONDAY, JUNE 12, 1978

NO. 4265

STATE OF MISSISSIPPI,

vs.

BARRY JOE ROBERTS,
Defendant.

SENTENCING

(The following proceedings were held in chambers in the courthouse in DeSoto County, MS. The Defendant was present with his attorney, Honorable J. W. Kellum, Sumner, MS. The State was represented by Honorable Robert L. Williams, Acting District Attorney, Water Valley, MS. Sheriff Fulks of Tallahatchie Co., MS. was present. Judge Dick R. Thomas presiding.)

Court: Mr. Kellum, is there anything you would like to say? I have the report and am ready to pass sentence.

Kellum: No, sir.

Court: Barry Joe Roberts, having been found guilty of manslaughter by culpable negligence by a jury of the First Judicial District of Tallahatchie County, Mississippi, the Court having received a pre-sentence investigation, it is the sentence of this Court that you be sentenced to serve a term of 20 years in an institution designated by the Mississippi Department of Corrections. That's a heavy sentence and I mean for it to be heavy because

there is a dead person involved but that doesn't mean that all is lost. If you go down there with the attitude that you're going to make a good prisoner and show them that attitude, that you are sorry, and work at it then you have the hope of getting your time cut. You can learn useful trades. It's not a vacation but at the same time you can come out of it with some use and with good behavior and recommendation and the proper attitude, then you have hope that your time will be cut. You have the right of visitation and other things can be done for you while you are down there, but that will be the sentence of the Court. Sheriff, he is remanded to your custody.

(Filed June 29, 1981)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

vs.

MORRIS THIGPEN, ET AL.,
Respondents.

ORDER

Pursuant to Rule 7, Rules Governing §2254 Cases, it is hereby Ordered that respondents shall within 14 days of this date file with the court all records relating to the misdemeanor convictions appeal of which was consolidated with petitioner's manslaughter trial and which are referred to in the record of the manslaughter trial as Cause Nos. 4266, 4267, 4268, and 4269.

ORDERED, this 26th day of June, 1981.

/s/ (Illegible)

United States Magistrate

(Filed July 10, 1981)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

CIVIL ACTION NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

versus

MORRIS THIGPEN, ET AL.,
Respondents.

SUPPLEMENT TO RULE 5 EXHIBITS

Pursuant to the Court's order of June 26, 1981, respondents in the above-styled and numbered matter attach hereto certified copies of the abstracts in cases 4266, 4267, 4268 and 4269. Counsel for the respondents is informed by the Circuit Clerk of Tallahatchie County, Mississippi, that all of said matters were passed to the files subsequent to the hearing on the manslaughter conviction.

(Filed September 1, 1977)

IN THE JUSTICE OF THE PEACE COURT
IN AND FOR DISTRICT ONE,
TALLAHATCHIE COUNTY,
MISSISSIPPI

Case #4266

STATE,

-versus-

BARRY JOE ROBERTS,
DEFENDANT:

ORDER

This day this cause came on to be heard on the affidavit of McCloud, Miss. Highway Patrol, charging the defendant herein with reckless driving, and the Court having now heard the matter, made the following disposition and order.

That the defendant was found (guilty) as charged and he was ordered to pay a fine of \$100.00 and to serve a term of 0 days in the county jail.

That defendant gave proper notice of his intention to appeal this decision to the Circuit Court and that on notice, his bond was set in the penal sum of \$200.00 by posting same in cash or with sufficient sureties to be approved by the Sheriff of this county.

It is therefore ordered that this matter be transferred to the Circuit Court of the First Judicial District of Tallahatchie County, Mississippi, for final disposition or writ of procedendo to this court.

This the 13th day of August, 1977.

/s/ Sandra B. Johnson
Justice of the Peace
District 1

I certify that I have this date delivered the original of this order to the Circuit Clerk for posting on the proper docket.

/s/ Sandra B. Johnson
Justice of the Peace

Aug. 13, 1977
Date

(Filed September 1, 1977)

IN THE JUSTICE OF THE PEACE COURT
IN AND FOR DISTRICT ONE,
TALLAHATCHIE COUNTY,
MISSISSIPPI

Case #4267

STATE

-versus-

BARRY JOE ROBERTS,
DEFENDANT:

ORDER

This day this cause came on to be heard on the affidavit of McCloud, Miss. Highway Patrol, charging the defendant herein with driving while license was under suspension, and the Court having now heard the matter, made the following disposition and order.

That the defendant was found (guilty) as charged and he was ordered to pay a fine of \$100.00 and to serve a term of 6 months in the county jail.

That defendant gave proper notice of his intention to appeal this decision to the Circuit Court and that on notice, his bond was set in the penal sum of \$200.00 by posting same in cash or with sufficient sureties to be approved by the Sheriff of this county.

It is therefore ordered that this matter be transferred to the Circuit Court of the First Judicial District of Tallahatchie County, Mississippi, for final disposition or writ of procedendo to this court.

This the 13th day of August, 1977.

/s/ Sandra B. Johnson
Justice of the Peace
District 1

I certify that I have this date delivered the original of this order to the Circuit Clerk for posting on the proper docket.

/s/ Sandra B. Johnson
Justice of the Peace

Aug. 13, 1977
Date

(Filed September 1, 1977)

IN THE JUSTICE OF THE PEACE COURT
IN AND FOR DISTRICT ONE,
TALLAHATCHIE COUNTY,
MISSISSIPPI

Case #4268

STATE

-versus-

BARRY JOE ROBERTS,
DEFENDANT:

ORDER

This day this cause came on to be heard on the affidavit of McCloud, Miss. Highway Patrol, charging the defendant herein with driving on wrong side of road, and the Court having now heard the matter, made the following disposition and order.

That the defendant was found (guilty) as charged and he was ordered to pay a fine of \$100.00 and to serve a term of 10 days in the county jail.

That defendant gave proper notice of his intention to appeal this decision to the Circuit Court and that on notice, his bond was set in the penal sum of \$200.00 by posting same in cash or with sufficient sureties to be approved by the Sheriff of this county.

It is therefore ordered that this matter be transferred to the Circuit Court of the First Judicial District of Tallahatchie County, Mississippi, for final disposition or writ of procedendo to this court.

This the 13th day of August, 1977.

/s/ Sandra B. Johnson
Justice of the Peace
District 1

I certify that I have this date delivered the original of this order to the Circuit Clerk for posting on the proper docket.

/s/ Sandra B. Johnson
Justice of the Peace

Aug. 13, 1977
Date

(Filed September 1, 1977)

IN THE JUSTICE OF THE PEACE COURT
IN AND FOR DISTRICT ONE,
TALLAHATCHIE COUNTY,
MISSISSIPPI

Case #4269

STATE

-versus-

BARRY JOE ROBERTS,
DEFENDANT:

ORDER

This day this cause came on to be heard on the affidavit of McCloud, Miss. Highway Patrol, charging the defendant herein with driving under influence, and the Court having now heard the matter, made the following disposition and order.

That the defendant was found (guilty) as charged and he was ordered to pay a fine of \$1000.00 and to serve a term of 11 months in the county jail.

That defendant gave proper notice of his intention to appeal this decision to the Circuit Court and that on notice, his bond was set in the penal sum of \$2000.00 by posting same in cash or with sufficient sureties to be approved by the Sheriff of this county.

It is therefore ordered that this matter be transferred to the Circuit Court of the First Judicial District of Tallahatchie County, Mississippi, for final disposition or writ of procedendo to this court.

This the 13th day of August, 1977.

/s/ Sandra B. Johnson
Justice of the Peace
District 1

I certify that I have this date delivered the original of this order to the Circuit Clerk for posting on the proper docket.

/s/ Sandra B. Johnson
Justice of the Peace

Aug. 13, 1977
Date

(Filed July 10, 1981)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

CIVIL ACTION NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

versus

MORRIS THIGPEN, ET AL.,
Respondents.

**PETITIONERS RESPONSE TO RESPONDENTS
RULE 5 EXHIBITS**

In response to Respondents' Rule 5 Exhibits, Petitioner would show that there are no remand orders in the case file of 4266, 4267, 4268 and 4269 (See Exhibit "1") and the dates of said remands cannot be determined.

It is therefore urged that this matter is controlled by the trial transcript which indicates that the matters were consolidated for appeal.

(Filed August 17, 1981)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

v.

MORRIS THIGPEN, ET AL.,
Respondents.

ORDER

Upon review of the petition for writ of habeas corpus filed herein, and to enable the court to evaluate properly petitioner's claims, it is hereby Ordered that within 14 days of this date petitioner shall supplement his petition to specify what evidence he contends was properly admitted on the misdemeanor appeals in question that was not otherwise admissible on the manslaughter charge against petitioner.

ORDERED, this 14th day of August, 1981.

/s/ Charles M. Powers
United States Magistrate

(Filed October 1, 1981)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

v.

MORRIS THIGPEN, ET AL.,
Respondents.

ORDER

It is hereby Ordered that respondent shall within 14 days of this date file a memorandum setting forth the reasons, if any, why petitioner should not be granted habeas relief under the authority of Blackledge v. Perry, 417 U.S. 21, 40 L.Ed.2d 628 (1974).

SO ORDERED, this 29th day of September, 1981.

/s/ Charles M. Powers
United States Magistrate

(Filed November 4, 1981)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

v.

MORRIS THIGPEN, ET AL.,
Defendants.

REPORT AND RECOMMENDATION

(The Magistrate's Report and Recommendation is reproduced in full as Exhibit 1 of the Appendix to the Petition for Certiorari in the present case. It can be found at pages A1 through A4 of the Petition.)

(Filed December 8, 1981)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

CIVIL ACTION NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

versus

MORRIS THIGPEN, ET AL.,
Respondents.

**RESPONDENT'S OBJECTION TO MAGISTRATE'S
REPORT AND RECOMMENDATION**

Comes now the Respondent in the above-styled and numbered cause and files his objection to Magistrate's Report and Recommendation filed November 3, 1981, and would show unto the Court the following:

I.

On November 3, 1981, the Magistrate filed a Report and Recommendation setting forth reasons why Petitioner should be granted habeas relief based upon the "Double Jeopardy Clause" of the United States Constitution. The Magistrate's Report and Recommendation also states that Petitioner may be granted relief based upon his right to due process of law under the Fourteenth Amendment.

II.

Addressing the double jeopardy question Magistrate Powers in his Report and Recommendation states:

It is thus apparent that manslaughter by automobile in violation of § 97-3-47 cannot be proved without at the same time proving reckless driving in violation of § 63-3-1201, and that conduct of petitioner that constituted reckless driving—losing control of his vehicle while driving under the influence, crossing the centerline, and colliding with the other vehicle—is *the same conduct that constituted the culpable negligence necessary for the manslaughter conviction.* [Emphasis Added].

Respondent would note to the Court that § 63-3-1201 and the conduct before the accident are considered "traffic offenses" in Mississippi. Those offenses consist wholly of the conduct of an operation of a motor vehicle upon the highways of this state and do not involve a wrongful homicide. The crime of manslaughter involves a wrongful homicide, an element altogether lacking in the traffic offenses.

Section 63-3-1201, Reckless Driving, requires that the vehicle be driven on the highways of this state before a citation can be issued. A motorist could not be given a citation for driving reckless in a private parking lot, however, that same motorist could be guilty of manslaughter under § 97-3-47 for the unintentional killing of someone in that private parking lot. It is clear that the two offenses are distinct both in law and fact. The traffic offenses are not lesser degrees of the crime of manslaughter.

As stated in Annot. 172 A.L.R. 1053 (1948), *Acquittal of One Offense in Connection With Operation of Automobile as Bar to Prosecution of Another.*

... it should be borne in mind that there is a distinction between an offense and the unlawful act out of which it arises and that the rule that a person shall

not be twice put in jeopardy for the same offense is directed to the identity of the offense and not to the act. [Emphasis Added].

... where two offenses, committed in the operation of a motor vehicle, are separate and distinct and the one is not necessarily included in the other, a prosecution for the one is no bar to a prosecution for the other, even though both offenses were committed at the same time and by the same act.

The Court in *Bacom v. Sullivan*, 200 F.2d 70 (5 Cir. 1952), cert. denied, 345 U.S. 910, 73 S.Ct. 651, 97 L.Ed. 1345 (1953) stated:

To constitute double jeopardy, it is not enough that the second prosecution arises out of the same facts as the first. It must be for the same 'offense.' The same act may constitute an offense against two separate statutes. The recognized test for determining the identity or separateness of offenses charged in two indictments is whether or not the same proof will sustain a conviction under both or whether one requires proof of facts, not required by the other. *Chrysler v. Zerbst*, 10 Cir., 81 F.2d 975; *McGinley v. Hudspeth*, 10 Cir., 120 F.2d 523.

If one statute requires proof of a fact which the other statute does not, then the offenses are not the same, and a conviction or acquittal under one does not bar a prosecution under the other as double jeopardy. *Graveires v. United States*, 220 U.S. 338, 31 S. Ct. 421, 55 L.Ed. 489; *Diaz v. United States*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500; *Sims v. Rives*, 66 App. D.C. 24, 84 F.2d 871, cert. denied, 298 U.S. 682, 56 S.Ct. 960, 80 L.Ed. 1402. In the latter case, quoting from *Morgan v. Devine*, 237 U.S. 632, 35 S.Ct. 712, 59 L.Ed.

1153, it was aptly said '* * * the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes.' [66 App. D.C. 24, 84 F.2d 876].

In *Cutshall v. State*, 191 M. 764, 4 So.2d 289 (Miss. 1941) the Supreme Court of Mississippi stated:

The driving of a vehicle by one who is under the influence of intoxicating liquor is a misdemeanor. § 49, Ch. 200, Laws 1938. The driving of an automobile while in this condition is therefore per se negligence. *Williams v. State*, 161 Miss. 406, 137 So. 106. But this does not mean that such evidence constitutes a prima facie case of manslaughter. (citations omitted)

It must be kept in mind that appellant is here prosecuted not for driving while under the influence of intoxicating liquor but for culpable negligence. These are separate offenses for which one could be separately prosecuted and neither prosecution would bar the other. See *State v. Sisneros*, 42 N.M. 500, 82 P.2d 274; *People v. Townsend*, 214 Mich. 267, 783 N.W. 177, 16 A.L.R. 902, 8 R.C.L. 147; *Holland v. State*, 123 Fla. 142, 166 So. 468. In a prosecution for manslaughter referable to culpable negligence, intoxication could be a relevant evidential facts. Yet it is not as controlling that the defendant in manslaughter was violating the traffic laws as that he was in fact culpably negligent. One may be negligent while acting lawfully. *State v. Brewen*, 169 Iowa 256, 151 N.W. 102; *Commonwealth v. Amatucci*, 29 Del. Co. R., Pa., 160. One may violate the law and yet not be culpably negligent in fact. *Commonwealth v. Aurick*, 138 Pa. Super. 180, 10 A.2d 22; *People v. Warner*, 27 Cal. App. 2d 190, 80 P.2d 737; *Commonwealth v. Williams*, 133 Pa. Super. 104, 1

A.2d 812. It is sufficient in a prosecution for the misdemeanor that the defendant be driving while under the influence of liquor. No injury need be shown.

The Supreme Court of Iowa addressed the same issues as are now before this Court in a very similar case. Also in that case the United States Supreme Court refused to hear petitioner's appeal. That case was *State v. Stewart*, 223 N.W.2d 250 (1974), cert. denied, 423 U.S. 902, 96 S.Ct. 205, 46 L.Ed.2d 134. In that case the Court held that defendant's reckless driving conviction which arose out of the same occurrence was not a lesser included offense of manslaughter and former jeopardy did not bar defendant's conviction of manslaughter.

In *State v. Stewart*, *supra*, the Court stated:

There are two steps in determining whether one offense is included within another. The first is a consideration of the elements. The lesser offense must be composed solely of some but not all elements of the greater crime. *The lesser crime must not require any additional element which is not needed to constitute the greater crime.* The lesser offense if therefore said to be necessarily included within the greater. [Emphasis Added].

It is only after the elements of the lesser crime are shown to be necessarily included in the greater crime that a second inquiry is made. The second inquiry is a factual one, undertaken on a case by case basis. . . . *the lesser crime (reckless driving) requires additional elements not needed to constitute the greater crime (manslaughter).* [Emphasis Added].

There are three elements to the crime of reckless driving under § 321-283, The Code. They are (1) the conscious and intentional operation of a motor

vehicle (2) in a manner which creates an unreasonable risk or harm to others (3) where such risk is or should be known to the driver. *State v. Baker*, 203 N.W.2d 795, (796) (Iowa) and authorities. Manslaughter under § 690-10, The Code, is the unlawful unintentional killing of a human being by another without malice express or implied. *State v. Boston*, 233 Iowa 1249, 1255, 11 N.W.2d 407, 410. We have no vehicular homicide statute in Iowa. But our cases acknowledge manslaughter can be committed by operating a motor vehicle in either of two ways. Manslaughter may result from the reckless operation of a motor vehicle. *State v. Wallin*, 195 N.W.2d 95, 99 (Iowa 1972); *State v. Means*, 211 N.W.2d 283 (Iowa 1973). It may result from operating a motor vehicle while intoxicated. *State v. Davis*, 196 N.W.2d 885, 890 (Iowa 1972).

However under either theory proof of manslaughter requires proof of fact (resultant death) which the other (either reckless driving or driving while intoxicated) does not. See *State v. Cook*, *supra*, and *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309.

233 N.W.2d at 253:

We think that reckless driving and manslaughter are not the same for former jeopardy purposes. We approve the following:

'The offense of reckless driving is not the same in law or in fact as, nor is it a lesser degree of, the offense of manslaughter arising out of the operation of a motor vehicle, even though they may arise from the same occurrence or transaction, and consequently an acquittal or conviction of reckless driving will not

be a bar to a prosecution for manslaughter arising out of the same facts. Nor will an acquittal or conviction of manslaughter serve as a bar to a prosecution for reckless driving arising out of the same facts does not bar a subsequent prosecution for causing the death of another by reckless driving, the offense not being the same.' 7 Am.Jur.2d, Automobiles and Highway Traffic, § 343, pages 889-890. See also 22 C.J.S. Criminal Law § 295(2), pages 771-772.

We conclude defendant is wrong in claiming reckless driving is a less included offense to manslaughter.

The Magistrate states that guidance of petitioner's contention, that he is entitled to habeas relief on the ground that trial on the manslaughter charge after trial and conviction of the misdemeanors violated his rights under the Double Jeopardy Clause of the Fifth Amendment, may be found in *Illinois v. Vitale*, 447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct. 2260 (1980). The Supreme Court in *Illinois v. Vitale*, held:

The Illinois Supreme Court did not expressly address the contentions that manslaughter by automobile could be proved without also providing a careless failure to reduce speed and we are reluctant to accept its rather cryptic remarks about the relationship between the two offenses involved here as an authoritative holding that under Illinois law proof of manslaughter by automobile would always involve a careless failure to reduce speed to avoid a collision.

Of course, any collision between two automobiles or between an automobile and a person involves a moving automobile and in that sense a "failure" to slow sufficiently to avoid the accident. But such a "failure" may not be reckless or even careless, if when the dan-

ger arose, slowing as much as reasonably possible would not alone have avoided the accident yet, reckless driving causing death might still be proved if, for example, a driver who had not been paying attention could have avoided the accident at the last second, had he been paying attention, by simply swerving his car. The point is that if manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the "same" under the Blockburger test. *The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution.* [Emphasis Added]. (65 L.Ed.2d at 237)

The Court in *State v. James*, 606 P.2d 1101 (N.M. App. 1979), found that the municipal court record did not show a plea of guilty or a trial to determine guilt or innocence on the traffic offense charge, the Court held that such circumstances did not rise to the level of a conviction for purposes of double jeopardy. It was then further held:

We also reassert the jurisdictional exception to using a lesser included offense as a bar to prosecution of the greater offense. The exception was set forth in *State v. Goodson*, 54 N.M. 184, 217 P.2d 262, 263 (1950), where the court quoted the following language from 1 F. Wharton, Criminal Law § 394 (12th ed.):

'And a conviction of a lesser offense bars a subsequent prosecution for a greater offense, in all those cases where the lesser offense is included in the greater offense, and visa versa. But a former trial and acquittal or prosecution, unless the defendant could have been convicted on the same evidence in the former

trial, of the offense charged in the subsequent trial. An acquittal or conviction for a minor offense included in a greater will not bar a prosecution for the greater if the court in which the acquittal or conviction was had was without jurisdiction to try the accused for the greater offense.'

The exception was recognized in the specially concurring opinion of Justice Sosa in *State v. Tanton*, 88 N.M. 333, 337, 540 P.2d 813, 817 (1975):

I would hold that conviction bars prosecution of a greater offense, subject to one exception: If the court does not have jurisdiction to try the crime, double jeopardy cannot attach. Double jeopardy requires that a court have sufficient jurisdiction to try the charge.

The exception does not conflict with the United States Supreme Court decision in *Waller v. Florida*, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970). The Waller decision stands for the proposition that two courts within a state—district and municipal—cannot each try a person for the same crime. However, the Supreme Court recognized the possible existence of exceptions to this rule. *Id.* at 395, n. 6, 90 S.Ct. 1184. In *Ashe v. Swenson*, 397 U.S. 436, 453, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). Mr. Justice Brennan specified and elaborated upon several of these exceptions in his concurring opinion. He stated: 'Another exception would be necessary if no single court has jurisdiction of all the alleged crimes.' *Id.* at 453, n. 7, 90 S.Ct. at 1199, n. 7.

It is clear that the justice court in the case presently before this Court was acting pursuant to its authority to punish petitioner for his traffic infractions, but it is equally

clear that it had no authority to prosecute for manslaughter. Consequently, under the jurisdictional exception the State's felony prosecution against petitioner was correct.

The jurisdictional exception observed in *James* has long possessed a statutory basis in Mississippi. Section 99-11-33, Mississippi Code Annotated (1972). See also: *Huffman v. State*, 84 Miss. 479, 36 So. 395 (1904).

Respondent submits that petitioner is not entitled to habeas relief. Respondent respectfully submits that petitioner's rights under the Double Jeopardy Clause of the Fifth Amendment were not violated and therefore petitioner's petition for habeas relief should be denied.

III.

Addressing the due process question, Magistrate Powers relies on *Blackledge v. Perry*, 417 U.S. 21, 40 L.Ed. 2d 628, 94 S.Ct. 2098, as controlling.

Blackledge, supra, deals with a North Carolina prisoner charged first with the misdemeanor assault with a deadly weapon on another prisoner. Blackledge was convicted in the state district court on this misdemeanor charge. Blackledge appealed this conviction to the superior court, and before the appeal was heard the prosecutor obtained an indictment covering the same conduct for the felony of assault with a deadly weapon with intent to kill and inflict serious bodily injury, to which Blackledge pled guilty.

Thereafter, Blackledge applied for a writ of habeas corpus in federal district court claiming that the felony indictment deprived him of due process. The district court granted the writ, and the court of appeals affirmed. *Blackledge, supra*, contains two (2) main issues: (1) the right under state law to a trial de novo without appre-

hension that the state will retaliate by substituting a more serious charge for the original one and thus subject him to a significantly increased potential period of incarceration; (2) that since Blackledge was originally convicted on a misdemeanor charge in state district court, North Carolina was precluded by the due process clause from even prosecuting Blackledge for the more serious charge in the superior court. Blackledge's guilty plea to the felony did not bar him from raising his constitutional claims in the federal habeas corpus proceedings.

Blackledge, supra, may be distinguished from the case presently before this Court in several ways.

In *Blackledge, supra*, the defendant was tried and convicted in the state district court of the misdemeanor charge of assault with a deadly weapon (G.S.N.C. § 14-33), and later pled guilty, after indictment, to the felony charge of assault with a deadly weapon with intent to kill and inflict serious bodily injury (G.S.N.C. § 14-32), arising from the same facts.

A look at the N.C. Gen. Stat. § 14-32 footnote (Elements of Offense), p. 345, Chapter 14 states:

In order for a conviction of crime under the provisions of this section there must be a charge and evidence thereon of five essential elements: an assault, the use of a deadly weapon, the intent to kill, infliction of serious injury, death not resulting and while an assault does not necessarily include a battery, where serious injury is inflicted a battery is necessarily implied. *State v. Hefner*, 199 N.C. 788, 155 S.E. 879 (1930).

A look at N.C. Gen. Stat. 14-33(b), p. 353, states:

Unless his conduct is covered under some other provision of law providing greater punishment, any per-

son who commits any aggravated assault, assault and battery, or affray is guilty of a misdemeanor punishable as provided in subsection (c) below. A person commits an aggravated assault or assault and battery if in the cause of such assault or assault and battery he:

- (1) uses deadly weapon or other means or force likely to inflict serious injury or serious damage to another person; or
- (2) inflicts serious damage to another person; or
- (3) intends to kill another person; or
- (4) assaults a female person; or
- (5) assaults a child under the age of twelve years; or
- (6) assaults a public officer while such officer is discharging or attempting to discharge a duty of his office.

Comparing the two statutes we see that in § 14-33 (Misdemeanor Assault) the first three elements of the offense are identical to three elements found in § 14-32 (Felony Assault).

N.C. Gen. Stat. § 14-33, footnote (It is an Included Offense Under § 14-32), p. 355, Chapter 14 states:

Assault with a deadly weapon is an essential element of the felony created and defined by § 14-32, being an included "less degree of the same crime." *State v. Weaver*, 264 N.C. 681, 142 S.E.2d 633 (1956).

The offense of an assault with a deadly weapon with intent to kill under this section; a general misdemeanor, is a lesser included offense of the felony charged in a bill of indictment drawn under § 14-32. *State v. Burris*, 3 N.C. App. 35, 164 S.E.2d 52 (1968).

It is imminently clear in *Blackledge, supra* that the misdemeanor charge arose from the same facts that resulted in the felony indictment.

Unlike *Blackledge, supra*, the present case before the Court involves several traffic misdemeanor convictions and the felony conviction of manslaughter by culpable negligence. The traffic misdemeanor convictions arose out of acts that were committed separate and apart from the felony manslaughter and surely could not be considered a lesser included offense to the crime of manslaughter for the purpose of the Double Jeopardy Clause.

The traffic misdemeanor charges which petitioner was convicted in justice court and appealed are (1) reckless driving, § 63-3-1201, 1972 Miss. Code Ann.

Any person who drives a vehicle in such a manner as to indicate either a willful or a wanton disregard for the safety of persons or property is guilty of reckless driving.

Every person convicted of reckless driving shall be punished upon a first conviction by a fine of not less than \$5.00 nor more than \$100.00 . . .

(2) Driving while license suspended or revoked, § 63-1-57, 1972 Miss. Code Ann.

Any person whose operator's license, or driving privilege as a nonresident, has been canceled, suspended or revoked as provided in this article, and who drives any motor vehicle upon the highways of this state, while such license or privilege is canceled, suspended, or revoked, is guilty of a misdemeanor and upon conviction shall be punished by imprisonment for not less than two days or more than six months. There may be imposed in addition thereto a fine of not more than one hundred dollars (\$100.00) for each offense.

(3) Driving on wrong side of road; Vehicle shall be driven on right half of roadway; exceptions § 63-3-601, 1972 Miss. Code Ann.

Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

1. When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;
2. When the right half of the roadway is closed to traffic while under construction or repair;
3. Upon a roadway divided into three marked lanes for traffic under the rules applicable thereon; or
4. Upon a roadway designated and sign-posted for one-way traffic.

(4) Driving under the influence; Operation of vehicle while under the influence of intoxicating liquor; results of chemical test unavailable, § 63-11-33, 1972 Miss. Code Ann.

1. It is unlawful for any person to drive or otherwise operate a vehicle within this state who is under the influence of intoxicating liquor, punishable as set forth in subsection (2) of this section.
2. Every person convicted of operating a vehicle while under the influence of intoxicating liquor, where a chemical test was not given or where the alcoholic content was not available in the prosecution, may be imprisoned for not less than ten (10) days nor more than one (1) year and shall be fined not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00),

or both. . The commissioner of public safety, or his duly authorized agent, shall revoke the license or permit to operate a vehicle within this state for a period of one year of any person who, without evidence from a chemical test, was convicted of operating a motor vehicle while under the influence as defined in subsection (1) of this section.

The felony charge to which petitioner was convicted, Homicide - all other killings, § 97-3-47, 1972 Miss. Code Ann.

Every other killing of a human being, by the act, procurement, or culpable negligence of another, and with authority of law, not provided for in this title, shall be manslaughter.

Comparing the above statutes we see that the statute covering the manslaughter conviction in no way incorporates any of the elements of the misdemeanor statutes.

The Court in *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) stated:

The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger v. United States*, 284 U.S. 299, 304, 76 L.Ed. 306, 52 S.Ct. 180 (1932):

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not . . .

This test emphasizes the elements of the two crimes. 'If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes . . .' *Iannelli v. United States*, 420 U.S. 770, 785 n. 17, 43 L.Ed.2d 616, 95 S.Ct. 1284 (1975). [Emphasis Added] (53 L.Ed.2d at 194)

In the recent case of *United States v. Cowart*, 595 F.2d 1023 (CA 5 1979), the same issue was addressed in this language:

This standard frequently has been referred to as the 'same evidence' test; however, the Blockburger test looks not to the evidence adduced at trial but focuses on the elements of the offense charged. *Brown v. Ohio*, 432 U.S. at 166, 97 S.Ct. at 2225 (Blockburger test emphasizes the elements of the two crimes); *Iannelli v. United States*, 420 U.S. 770, 785 n. 17, 95 S.Ct. 1284, 1294, 43 L.Ed.2d 616 (1975) ("if each [offense] requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.") *United States v. Dunbar*, 591 F.2d 1190, 1193 (5th Cir. 1979) ("Application of the [Blockburger] test focuses on the statutory elements of the offenses charged."). (Emphasis Added) (595 F.2d at 1023)

Similarly, it was held in *Walker v. Loggins*, 608 F.2d 731 (CA 9 1979):

The application of this test focuses on the statutory elements of the offense charged, not the particular manner in which the offense was committed or described in the indictment. *Iannelli v. United States*,

420 U.S. 770, 785 n. 17, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975).

An examination of statutory offenses here involved reveals that each contains elements not common to the other. The offenses of reckless driving, driving while license suspended or revoked, driving on wrong side of road, driving under the influence, are predicated upon the manner of operation of a motor vehicle upon the streets or highways of this State and are in no manner dependent upon any resultant injury to persons or property. See *Barnes v. State*, 249 Miss. 482, 162 So.2d 865 (1964); *Gause v. State*, 203 Miss. 377, 34 So.2d 729 (1948); *Sanford v. State*, 195 Miss. 896, 16 So.2d 628 (1944). The crime of manslaughter by culpable negligence, by contrast, not only involves an unlawful homicide, but is not restricted as to either instrumentality or location. *Gandy v. State*, 373 So.2d 1042 (1979). See also: *Cutshall v. State*, 191 Miss. 764, 4 So.2d 289 (1941). These offenses therefore are neither the same in law or fact.

Respondent submits there has been no violation of petitioner's due process rights under the Fourteenth Amendment. Based upon the foregoing authority and argument Respondent respectfully submits that petitioner's petition for habeas corpus relief should be denied.

(Filed January 21, 1982)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

v.

MORRIS THIGPEN, et al.,
Defendants.

ORDER

(The District Court's Order adopting the report and recommendation and granting the Writ is reproduced in full as Exhibit 2 of the Appendix to the Petition for Certiorari. It can be found at page A5 of the Petition

(Filed February 18, 1982)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

CIVIL ACTION NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

versus

MORRIS THIGPEN, et al.,
Respondents.

NOTICE OF APPEAL

PLEASE TAKE NOTICE that the Respondents hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order of January 18, 1982, entered by this Court granting Petitioner's habeas corpus relief.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-4067

BARRY JOE ROBERTS,
Petitioner-Appellee,

versus

MORRIS THIGPEN, Commissioner, Mississippi
Department of Corrections, ET AL.,
Respondents-Appellants.

Appeal from the United States District Court
For the Northern District of Mississippi

(NOVEMBER 16, 1982)

Before RUBIN and JOHNSON, Circuit Judges, and
DAVIS,* District Judge.

PER CURIAM:

(The opinion of the Court of Appeals is reproduced
in full as Exhibit 4 of the Appendix to the Petition for
Certiorari. It can be found at pages A7-A13 of the Peti-
tion)